7

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 472.

THE WYANDOTTE COUNTY GAS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS ON THE RELATION OF JOHN MARSHALL, ATTORNEY FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED MARCH 1, 1913.

(23,570)

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1 In the Supreme Court of the State of Kansas.

No. 18221.

THE STATE OF KANSAS ex Rel. JOHN MARSHALL, Attorney for the Public Utilities Commission of Kansas, Appellee,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Appellant.

Be it remembered, That on the 9th day of May 1912, there was filed in the office of the clerk of the supreme court of the state of Kansas, a duly certified copy of the Notice of appeal and proof of service thereof, and a duly certified copy of the Journal entry of judgment from which said appeal was taken, which Notice of appeal, Proof of service, and Journal Entry of Judgment are in the words and figures, as follows, to-wit:

2 Filed May 9, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18221.

THE STATE OF KANSAS on the Relation of JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas, Appellee,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Appellant.

Appeal.

Appearances:

John Marshall, Attorney for Public Utilities Commission of the State of Kansas;
R. J. Higgins, Attorney of Record, Attorneys for Appellee.
J. W. Dana, Attorney for Appellant.

3 In the District Court of Wyandotte County, Kansas, First Division.

No. 24876.

THE STATE OF KANSAS on the Relation of JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas, Plaintiff,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Defendant.

Notice of Appeal of the Defendant, The Wyandotte County Gas Company.

To the Plaintiff, The State of Kansas on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas and Its Attorneys of Record:

You will take notice that the defendant, The Wyandotte County Gas Company, hereby appeals to the Supreme Court from the following orders, decisions, judgments and decrees of the District Court of Wyandotte County, Kansas, First Division, Honorable E. L. Fischer, Judge, to-wit:

1. The order overruling the defendant's demurrer to the plaintiff's petition rendered on the 27 day of Jan. 1912.

2. The order granting a temporary injunction rendered on the 27th day of January, 1912.

3. The order overruling the defendant's motion and application to require the plaintiff to give bond to secure the defendant against loss and damage by reason of the issuance of said temporary injunction, said order involving the merits and subject-matter of the controversy, rendered January 27th, 1912.

4 4. The order overruling the defendant's motion to dissolve the restraining order and temporary injunction and permit the defendant to collect the sums in controversy in the above entitled cause upon giving bond approved by the court, and hold or deposit the same subject to the order of the court, rendered January 27th, 1912.

5. The order, judgment and decree granting a permanent injunction against the defendant in the above entitled cause rendered on May 3d, 1912.

6. The order overruling the defendant's motion for a new trial rendered May 4th, 1912.

Govern yourself accordingly.

J. W. DANA,
Attorney for Defendant.

Personal service of a copy of the foregoing notice of appeal is hereby acknowledged this 8 day of May, 1912.

JOHN MARSHALL, *Counsel.*

5 In the District Court of Wyandotte County, Kansas, First Division.

No. 24876.

THE STATE OF KANSAS on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, Plaintiff,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Defendant.

Proof of Service of Notice of Appeal.

STATE OF KANSAS,
County of Wyandotte, ss:

J. W. Dana, being first duly sworn, deposes and says: That he is the attorney for the above named defendant; that one R. J. Higgins, Attorney at Law, residing in Wyandotte County, Kansas, appeared as attorney of record in the above entitled cause; that personal service of the notice of appeal can not at this time be had upon said R. J. Higgins, within the State of Kansas, for the reason that he is at this time sojourning in the East; that this affiant did on the 8th day of May, 1912, deposit in the mail at Kansas City, Kansas, a true and correct copy of said notice enclosed in a return envelope property addressed to the said R. J. Higgins at his place of residence, to-wit, 606 North Sixteenth Street, in Kansas City, Kansas, postage prepaid.

Affiant further says that on the 8 day of May, 1912, he delivered a true and correct copy of said notice of appeal to Honorable John Marshall, Attorney of record in the above entitled cause.

And further affiant saith not.

J. W. DANA.

Subscribed and sworn to before me this 8 day of May, 1912.

[SEAL.] MAUDE HAYS,
Notary Public.

My commission expires February 23d, 1914.

6 In the District Court of Wyandotte County, Kansas, First Division.

No. 24876.

THE STATE OF KANSAS on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, Plaintiff,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Defendant.

Journal Entry on Demurrer to the Petition.

And now on this 27th day of January, 1912, this cause came on to be heard upon the defendant's demurrer to the plaintiff's petition, the plaintiff appearing by John Marshall, Attorney for the Public Utilities Commission, and R. J. Higgins, the defendant appearing by its attorneys, J. W. Dana and George R. Allen, and the court after hearing the argument of counsel and submission of briefs takes said case under advisement until the 3d day of February, 1912.

And now on this 3d day of February, 1912, the parties appearing as before, the court doth overrule said demurrer to the plaintiff's petition, to which ruling the defendant duly excepted and excepts.

E. L. FISCHER, *Judge*.

7 In the District Court of Wyandotte County, Kansas, First Division.

No. 24876.

THE STATE OF KANSAS on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, Plaintiff,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Defendant.

Journal Entry on Temporary Injunction.

And now on this 27th day of January, 1912, this cause came on for hearing upon the application of the plaintiff for a temporary injunction, the plaintiff appearing by John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, and R. J. Higgins, the defendant appearing by J. W. Dana, its attorney, and the Court after examining the pleadings and hearing the evidence and argument of counsel thereon doth take said case under advisement for one week.

Whereupon, the defendant moved the Court for an order requiring the plaintiff to give an undertaking executed by one or more sufficient sureties to be approved by the Court or the Clerk thereof

in such amount as may be fixed by the Court to secure the defendant against damages it may sustain if it be finally decided that the restraining order issued and now effective in said cause ought not to have been granted, which motion the court overruled, to which ruling the defendant duly excepted and now excepts.

8 Whereupon, the defendant moved the court for a stay of the effect of the restraining order issued, and now operative herein upon the defendant giving an undertaking executed by one or more sufficient sureties to be approved by the court in such amount as may be fixed by the court on such conditions as the court may fix, to the effect that the defendant will pay to the plaintiff all cost, loss or damage it may sustain and will refund to all consumers of gas the Two Cents per thousand cubic feet, the collection of which is restrained herein, and to secure to the plaintiff and all persons interested in or affected by this suit all damages it or they may sustain if it be finally decided that said restraining order is properly granted, which motion the court overruled, to which ruling the defendant duly excepted and now excepts.

Thereupon, the hearing in said cause was adjourned to February 3d, 1912.

And now on this 3d day of February, 1912, this cause came on for decision upon said application for a temporary injunction, and the court sustained said application

It is ordered, adjudged and decreed that the defendant, its officers, agents and employees, be and the same are hereby temporarily enjoined from increasing the price for said natural gas to the consumers thereof in the City of Kansas City, Kansas, and Rosedale, Kansas, and Wyandotte County, Kansas, from Twenty-five Cents to Twenty-Seven Cents per thousand cubic feet, or collecting a greater price than was collected on January 1st, 1911, to-wit, Twenty-five Cents per thousand cubic feet, to which order the defendant then and there duly excepted and now excepts.

Thereupon, the defendant moved the court to require the plaintiff to give an undertaking executed by one or more sufficient

9 sureties before said temporary injunction should become operative to be approved by the court or the clerk thereof in an amount to be fixed by the court to secure to the defendant the damages it may sustain if it be finally decided that this temporary injunction ought not to have been granted, which motion the court overruled, to which ruling the defendant duly excepted and now excepts.

Thereupon, the defendant announced its intention to perfect an immediate appeal of said cause to the Supreme Court and moved the court for an order to stay the effect of said order granting said temporary injunction upon the defendant giving to the plaintiff and all persons interested in said suit, an undertaking with one or more sufficient sureties, to be approved by the court or the clerk, conditioned that if the order granting said temporary injunction be affirmed in whole or in part the defendant will pay to the plaintiff and to all consumers of gas or others interested in this suit all damages that it or they may sustain by reason of such proceedings, and

all costs in the Supreme Court, and that the defendant will collect and hold or deposit in court and account for the Two Cents per thousand cubic feet, the collection of which is restrained by this temporary injunction, and will repay and refund to all consumers of gas said Two cents on such terms and under such regulations as may be approved by the court if it shall be finally determined that this temporary injunction is properly granted, which motion the court overruled, to which ruling the defendant duly excepted and excepts.

E. L. FISCHER, *Judge*.

10 In the District Court of Wyandotte County, Kansas.

No. 24876.

THE STATE OF KANSAS on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, Plaintiff,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Defendant.

Final Decree.

And now on this 3 day of May, 1912, this cause came regularly on for trial upon its merits upon the issues joined herein, plaintiff appearing by John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, and R. J. Higgins, and the defendant appearing by J. W. Dana, its attorney; whereupon, the parties hereto file a stipulation submitting said cause to the court for final judgment and decree upon the evidence heretofore introduced on the hearing of the application for temporary injunction in said cause, said evidence being subject to objection only upon the grounds of its competency, and the court being fully advised in the premises doth here now find the issues joined herein in favor of the plaintiff and against the defendant. Wherefore;

It is ordered, adjudged and decreed, That the defendant, The Wyanotte County Gas Company, and its officers, agents, and employees, be and the same are hereby perpetually enjoined from increasing the price for said natural gas to the consumers thereof in the City of Kansas City, Kansas, and Rosedale, Kansas, and Wyandotte County, Kansas, from Twenty-five Cents to Twenty-Seven Cents per thousand cubic feet and from collecting a greater price than was collected on January 1st, 1911, to-wit, Twenty-five cents per thousand cubic feet, to which judgment and decision the defendant then and there duly excepted and now excepts.

11 It is further ordered, adjudged and decreed that the defendant pay the costs of this suit here now taxed at $—, to which ruling, order and judgment the defendant duly excepted and now excepts.

E. L. FISCHER, *Judge*.

12 In the District Court of Wyandotte County, Kansas.

No. 24876.

THE STATE OF KANSAS on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, Plaintiff,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Defendant.

Journal Entry on Motion for New Trial.

And now on this 4th day of May, 1912, this cause came regularly on for hearing upon the motion of the defendant herein for a new trial, and the court after hearing the argument of counsel and being fully advised in the premises doth overrule said motion, to which ruling the defendant duly excepted.

E. L. FISCHER, *Judge*.

13 In the District Court of Wyandotte County, Kansas, First Division.

No. 24876.

THE STATE OF KANSAS on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, Plaintiff,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Defendant.

Certificate.

STATE OF KANSAS,
County of Wyandotte, ss:

I, R. J. McFarland, the duly elected, qualified and acting Clerk of the District Court of Wyandotte County, Kansas, do hereby certify that the above and foregoing is a full, true and correct copy and transcript of the following named notice of appeal, proof of service and orders of court in the above entitled case, to-wit:

1. The notice of appeal of the defendant, The Wyandotte County Gas Company, filed in this office on the 7 day of May, 1912.
2. The proof of service of said notice of appeal filed in this office on the 8 day of May, 1912.
3. The order of court overruling the defendant's demurrer to the plaintiff's petition, rendered on the 27th day of January, 1912.
4. The order of court granting a temporary injunction against the defendant, rendered January 27th, 1912.
5. The order, judgment and decree of court granting a perpetual injunction rendered May 3, 1912.

14 6. The order of court overruling the defendant's motion for new trial, rendered May 4, 1912.

As the same, to-wit, said notice, proof of service and orders, judgments and decrees, appear of record and on file in the office of the Clerk of the District Court of Wyandotte County, Kansas.

In testimony whereof, I have hereunto subscribed my official signature and affixed the seal of my office this 8 day of May, 1912.

[SEAL.] R. J. McFARLAND,
Clerk of the District Court.
By C. S. THOMAS, *Deputy.*

Endorsed: In the Supreme Court of the State of Kansas. No. 18221. The State of Kansas, on the relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, Appellee, vs. The Wyandotte County Gas Company, a Corporation, appellant. Appeal. J. W. Dana, Att'y for Appellant. Filed May 9, 1912. D. A. Valentine, Clerk Supreme Court.

15 And also on the same day to-wit, the 9th day of May 1912, there was filed in the office of the clerk of the supreme court of the state of Kansas, a motion for a Stay of the execution of the judgment of the District Court of Wyandotte county, which motion is in the words and figures, as follows, to-wit

16 Filed May 9, 1912. D. A. Valentine, Clerk Supreme Court

In the Supreme Court of the State of Kansas.

No. 18221.

THE STATE OF KANSAS on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, Appellee,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Appellant.

Motion to Stay Judgment.

Now comes the appellant, The Wyandotte County Gas Company, and represents and shows to the court that it is now and was prior to the passage of the Act relating to Public Utilities of the State of Kansas the owner and holder of a certain contract and franchise of the City of Kansas City, Kansas, evidenced by ordinance No. 6051 of said City granted and passed by the mayor and council of said city under authority granted by the Legislature to said mayor and council to grant such franchise and make such contract for the supply of natural gas to said city and its inhabitants "on such terms and conditions as may be agreed upon by said mayor and council and such person, company or corporation" supplying natural gas. (Sec. 906 G. S. 1905.)

Appellant further says that it is now and was prior to the passage of the Act relating to Public Utilities of the State of Kansas, the owner and holder of a certain contract and franchise of the City of Rosedale, Kansas, evidenced by Ordinance No. 295 of said city granted and passed by the mayor and council of said city under authority granted by the legislature to make such contract and grant such franchise for the supply of natural gas and fix rates for private consumers therein. (Sec. 663 G. S. 1905.)

Appellant further says that the price of natural gas to be furnished under and pursuant to said franchises and contracts was definitely fixed therein for a period of Twenty years, and that the net price which this appellant is now entitled to charge and collect from its consumers of gas in the City of Kansas City, Kansas, and Rosedale, Kansas, under said contracts is Twenty-seven Cents per thousand cubic feet.

17 That notwithstanding said contracts and the fact that this appellant has spent over a Million Dollars in equipment and appliances for the furnishing of natural gas to said cities and their inhabitants under and in accordance with the terms and conditions of said franchises and contracts, the appellee, the State of Kansas, on the relation of John Marshall, Attorney for the Public Utilities Commission of said State, did on or about the — day of Jan., 1912, commence an action in the District Court of Wyandotte County, Kansas, to enjoin this appellant from charging and collecting from its consumers of gas in said city the contract price agreed upon in said franchise ordinances, and that on the 3d day of May, 1912, a final decree was granted by Honorable E. L. Fischer, Judge of said Court, permanently and perpetually enjoining this appellant from collecting the said price agreed upon in said ordinances, to-wit, any sum in excess of Twenty-five Cents per thousand cubic feet; that said decree is in direct violation of the specific terms and provisions of said franchise contracts and is an impairment of said contracts and the taking of appellant's property therein without due process of law and without compensation.

Appellant further says that this appeal is filed in good faith and for the purpose of testing the validity of its franchise contracts aforesaid, and involves the construction of Section 663 G. S. 1905, authorizing the granting of the Kansas City, Kansas, Franchise, and the act relating to public utilities, under which said contracts are impaired by virtue of this suit.

Appellant further says that it has about 18,000 consumers; that a large per cent of said consumers are transient, residing in the city but a very short time; that within the last 90 days 2248 consumers have moved, and their gas has been turned off; that there have been 551 more turned off than turned on and that great numbers of said moving consumers have gone to parts unknown, and that this appellant has no possible way of securing itself against loss from such consumers; that the difference between the contract price of gas fixed by said ordinances, to-wit, Twenty-seven Cents, and the price fixed by the decree of injunction of the District

Court of Wyandotte County, Kansas, to-wit, Twenty-five Cents, is Two Cents per thousand cubic feet, and amounts to approximately $4,000.00 per month, and that at least 75 per cent of said sum will be lost by reason of the character and class of consumers, that
18 most of said consumers are employees working on a weekly wage, and it is necessary for them to pay their gas bills regularly from month to month, and that many of them will be unable to pay up the Two Cents per thousand cubic feet in arrears if it is finally determined that this appellant is entitled to collect the same; appellant further says that many of its consumers object to the payment of said bills at a rate of Twenty-five Cents without receiving receipts in full for the gas consumed, and that many of the consumers are taking advantage of such condition and refusing to pay their bills altogether; and that by reason of the premises and numerous other conditions that arise in the conduct of appellant's business it is sustaining daily loss of a large sum of money, to-wit, at least $150.00, by reason of said decree, which loss this appellant has and will have no means of repairing.

Appellant further states to the court that it offers to give bond running to the State of Kansas in such sum as the court may fix to insure the re-payment of the said Two Cents per thousand cubic feet to all consumers paying the same, if it be finally determined that this appellant is not entitled to collect the same, or to do and perform any other act or thing which to this court may seem equitable and just, to the end that justice may be done in this suit.

Wherefore, Appellant, The Wyandotte County Gas Company, moves the court for an order staying the final decree of the Honorable E. L. Fischer, Judge of the District Court of Wyandotte County, Kansas, and permitting this appellant to charge and collect from its consumers of gas in Kansas City, Kansas, and Rosedale, Kansas, the prices fixed and determined in its said franchises granted by said cities, to-wit, the sum of Twenty-Seven Cents per thousand cubic feet net, and that said judgment may be stayed pending this appeal on such terms and conditions as may be prescribed by this Honorable Court, and preserve the rights of all parties concerned.

J. W. DANA,
Attorney for Appellant.

19 STATE OF KANSAS,
County of Wyandotte, ss:

W. H. McKenzie, of lawful age, being first duly sworn, deposes and says: That he is the General Manager of appellant, The Wyandotte County Gas Company; that he is familiar with the facts set forth in the foregoing motion, and that the same are true.

And further affiant saith not.

W. H. McKENZIE.

Subscribed and sworn to before me this 8th day of May, 1912.

[SEAL.] MAUDE HAYS,
Notary Public.

My commission expires February 23d, 1914.

(Endorsed:) In the Supreme Court of the State of Kansas. No. 18221. The State of Kansas on the relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, Appellee, vs. The Wyandotte County Gas Company, a Corporation, Appellant. Motion to Stay Judgment. Filed May 9, 1912. D. A. Valentine, Clerk Supreme Court.

20 Be it further remembered, that afterwards, on Saturday the 11th day of May, 1912, the same being one of the regular judicial days of the January 1912 Term of the supreme court of the state of Kansas, in session at its court room in the city of Topeka, the following proceeding among others was had and entered of record in the words and figures as follows, to-wit:

21 In the Supreme Court of the State of Kansas, Saturday, May 11th, 1912.

No. 18221.

THE STATE OF KANSAS ex Rel. JOHN MARSHALL, Attorney for the Public Utilities Commission of Kansas, Appellee,

v.

THE WYANDOTTE COUNTY GAS CO., a Corporation, Appellant.

Journal Entry of Stay.

And now on this 11th day of May 1912, this cause came on to be heard upon the motion and application of the appellant herein for a stay of the judgment of the trial court, the appellee appearing by John Marshall, its attorney and the appellant appearing by J. W. Dana, its attorney, and the court after examining said motion and hearing the evidence and argument of counsel thereon, and being fully advised in the premises, doth sustain said motion, wherefore,

It is ordered by the court, that pending the appeal of this cause and until the further order of this court the judgment and decree of the district court of Wyandotte county, Kansas, be and the same is hereby stayed, and the appellant, The Wyandotte County Gas Company is hereby authorized and empowered to charge and collect from its consumers of gas in Kansas City, Kansas, and Rosedale, Kansas, and Wyandotte county, Kansas, from this date, the net price fixed by the ordinances of said cities, to-wit, the net sum of twenty-seven cents per thousand cubic feet for all gas furnished by said appellant to such consumers the granting of this decree shall not operate to authorize or warrant the turning off of gas from any consumer for non-payment of said deliquent two cents per thousand cubic feet which delinquency accrued prior to this date.

And appellant is further ordered to hold said excess two cents per thousand cubic feet in a separate fund and not disburse the same to any person, company or corporation, claiming any interest therein except as provided for herein, and to stamp on the receipt of all con-

sumers a recital that said consumer is entitled to a rebate of two cents per thousand cubic feet if it shall be finally determined that the appellant is not entitled to collect the same.

It is further ordered by the court, that the appellant, The Wyandotte County Gas Company, shall, within ten (10) days from this date file in the office of the clerk of this court a bond in the sum of $10,000.00 to be approved by the court, conditioned that said appellant will refund to all consumers of gas in the City of Kansas City, Kansas, and Rosedale, Kansas, and Wyandotte county, Kansas, the sum of two cents per thousand cubic feet for all gas paid for by said consumer on or before the 10th day of the month following the month in which the gas is used at the net rate of Twenty-seven cents per thousand cubic feet—in the event it shall be finally determined that said appellant is not entitled to charge and collect from said consumers of gas in the city of Kansas City, Kansas, and Rosedale, Kansas, and Wyandotte county, Kansas, any sum in excess of Twenty-five cents per thousand cubic feet.

22 Be it further remembered, that afterwards on the 16th. day of May 1912, there was filed in the office of the clerk of the supreme court of the state of Kansas, a Bond for Stay, which together with the approval endorsed thereon, is in the words and figures as follows, to-wit:

23 Filed May 16, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18221.

THE STATE OF KANSAS ex rel., Appellee,
vs.
THE WYANDOTTE COUNTY GAS COMPANY, Appellant.

Bond.

Know all men by these presents, That The Wyandotte County Gas Company as Principal, and C. N. Prouty as Surety, are held and firmly bound unto the State of Kansas, in the sum of $10,000.00, for the payment of which we do hereby bind ourselves, our heirs, executors, administrators, successors and assigns, firmly by these presents. The condition of this undertaking is such that,

Whereas, A final decree was issued by the District Court of Wyandotte County, Kansas, on the 3d day of May, 1912, enjoining the Wyandotte County Gas Company from collecting from its consumers of natural gas in the City of Kansas City, Kansas, and Rosedale, Kansas, and Wyandotte County, Kansas, any sum in excess of Twenty-five Cents per thousand cubic feet. And,

Whereas, Said Company has appealed from said order to the Supreme Court of Kansas, and said appellate court has issued an order

staying the effect of the decree of the District Court of Wyandotte County, Kansas pending said appeal.

Now if the said The Wyandotte County Gas Company shall refund and pay the sum of Two Cents per thousand cubic feet to all consumers of natural gas in Kansas City, Rosedale and Wyandotte County, Kansas, who pay their bills on or before the 10th day of the month following the month in which the gas is consumed at the rate of Twenty-seven Cents per thousand cubic feet if it shall be finally determined that the appellant, The Wyandotte County Gas Company, is not entitled to collect for said gas at the rate of Twenty-seven Cents per thousand cubic feet, then this obligation shall be void, otherwise to be and remain in full force and effect.

THE WYANDOTTE COUNTY GAS COMPANY,
By E. L. BRUNDETT, *President.*
C. N. PROUTY, *Surety.*

Attest:
[SEAL.] M. J. BARRY,
Assistant Secretary.

Endorsed: 18,221. In the Supreme Court of the State of Kansas. The State of Kansas, ex rel. Appellee, vs. The Wyandotte County Gas Company, Appellant. Stay Bond. Approved: Silas Porter, Justice. This bond is perfectly good. J. W. Dana, Attorney for Appellant.

21 Be it further remembered, that afterwards, on the 7th. day of June, 1912, there was filed in the office of the clerk of the supreme court of the state of Kansas, an abstract of the record, prepared by the appellant, which abstract of the record is in the words and figures as follows, to-wit:—

25 18221.

Filed Nov. 9, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18221.

THE STATE OF KANSAS on the Relation of JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas, Appellee.

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Appellant.

Abstract of the Record.

(Prepared by Appellant.)

J. W. Dana, Attorney for Appellant.

26 In the Supreme Court of the State of Kansas.

No. 18221.

THE STATE OF KANSAS on the Relation of JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas, Appellee,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Appellant.

Abstract of the Record.

(Prepared by Appellant.)

Questions Involved.

This case involves two questions: (1) The extent of the Public Utilities Commission's jurisdiction over utilities situated and operated wholly or principally within Kansas City, Kansas, and Rosedale, Kansas; (2) Whether or not said cities had the power and authority to grant the franchises and enter into the contracts
27 for supplying such cities and their inhabitants with natural gas at the time said franchises were granted in 1904 and 1905.

These questions call for the construction of three statutes:

1. The Act Relating to Public Utilities, particularly Sections 3, 30 and 33 thereof defining and limiting the jurisdiction of the Commission; the question being: Has the Commission jurisdiction over a public utility, "situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people."

2. The Act Relating to Cities of the Second Class with reference to the powers of such cities to make contracts and grant franchises for natural gas, particularly Sec. 633, G. S. 1905, which provides, that:

The mayor and city council of any city of the second or third class are hereby authorized to contract for and fix rates for private consumers for a period of not exceeding twenty years, with any person, company or corporation, for supplying the city and its inhabitants with water for fire protection, or lighting, or supplying with water and light the streets, alleys, parks and city buildings, or furnishing water, heat, light or power for public or private use.

3. The Act Relating to Cities of the First Class with reference to the power of such cities to make contracts and grant franchises for natural gas, particularly Sec. 906, G. S. 1905, which provides, that:

Nothing in this act shall be construed as prohibiting any city governed and controlled by the provisions of this act from granting, and the mayor and council of any such city are hereby authorized to grant, to any person, company or corporation, a franchise to con-

struct, maintain and operate a natural gas plant for the pur-
28 poses of furnishing to said city and its inhabitants natural gas for lights, fuel, and all other purposes, with authority to lay and maintain all necessary mains and pipes in the streets, avenues, alleys and public grounds of said city, on such terms and conditions as may be agreed to by said mayor and council and such person, company or corporation: Provided that such franchise shall not continue for a longer period than twenty years.

Statement.

The essential facts disclosed by the evidence are, that the appellant maintains and operates a natural gas plant in Kansas City, Kansas, under a franchise granted in 1904 which fixed the schedule of rates and prices for natural gas for public and private use for a term of twenty years.

That the appellant also maintains and operates a natural gas plant in Rosedale under a franchise granted in 1905, which fixed the schedule of rates and prices for natural gas for public and private use for a term of twenty years.

That these two plants are wholly separate and distinct, having no connection or relation, one to the other, except identity of ownership.

That the city and state authorities have acquiesced in these contracts for 7 or 8 years and the appellant has expended large sums of money in performing its obligations thereunder and the Public Utilities Commission has assumed no control over the appellant, or its business, prior to filing this suit January 4, 1912.

29 That prior to November 19, 1911, the appellant charged and collected from its consumers of gas in Kansas City and Rosedale the net rate of twenty-five cents per thousand cubic feet as fixed by the ordinances of said cities.

That the price fixed by said franchises for gas furnished from and after November 19, 1911, was 27 cents per thousand cubic feet if paid on or before the 10th of the month following the month it was used and 29 cents if paid thereafter; that after November 19, 1911, appellant commenced to charge and collect from said consumers the said net price of twenty-seven cents per thousand cubic feet as fixed by said franchise ordinances of said cities.

That appellant changed the price from twenty-five cents to twenty-seven cents on or about the 19th day of November, 1911, without any order or consent having been asked of or given by the Public Utilities Commission of this state.

Suit Commenced.

That this suit was commenced on January 4th, 1912, to enjoin the appellant from collecting said twenty-seven cent net rate without obtaining an order from the Commission authorizing said raise.

Petition.

Now comes said plaintiff, and for cause of action against said defendant, alleges:

That George Plumb, Frank J. Ryan and John T. White
30 are the duly elected, qualified and acting members of the Public Utilities Commission of the State of Kansas, and as such constitute the Public Utilities Commission of the State of Kansas.

That John Marshall is the duly appointed, qualified and acting attorney for the Public Utilities Commission of the State of Kansas.

That on the third day of January, 1912, and prior to the filing of this petition, the said Public Utilities Commission of the State of Kansas ordered that said John Marshall begin and prosecute an action in the said District Court of Wyandotte County, Kansas, against the above-named defendant, to enjoin and restrain the said defendant, and its officers, agents and employees from advancing the price of natural gas to the consumers thereof in the cities of Kansas City, Kansas, and of Rosedale, and to the consumers of natural gas in Wyandotte County, Kansas, outside of said cities, both of which said cities are situated in Wyandotte County, in the State of Kansas.

That the said defendant, the Wyandotte County Gas Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas.

That the city of Kansas City is a municipal corporation and a city of the first class, organized and existing under and by virtue of the laws of the State of Kansas, and is situated in Wyandotte County, Kansas.

That the City of Rosedale is a municipal corporation, a city of the second class, organized and existing under and by virtue of the laws of the State of Kansas, and is situated in the County of Wyandotte, in the State of Kansas.

That the said defendant, the Wyandotte County Gas Company, is a public utility and is now, and for more than two years last past has been engaged in the conveyance of gas through pipe lines, in and through the said cities of Kansas City and Rosedale, and the said County of Wyandotte, and in supplying and delivering natural gas to the said cities and the inhabitants thereof, and the inhabitants of Wyandotte County, for manufacturing, illuminating and
31 heating, and for all other purposes for which natural gas is used, and the said defendant does now use, and for more than two years last past has used the streets, avenues and public grounds of said cities and the public highways of Wyandotte County, Kansas, for the purpose of laying their mains and pipes to supply natural gas to the said cities and the inhabitants thereof, and to the inhabitants of said county.

That on the first day of January, 1911, the said defendant, the Wyandotte County Gas Company, was charging domestic consumers of natural gas in the said city of Kansas City, and in the said City

of Rosedale, and in Wyandotte County, Kansas, the sum of 25 cents per thousand cubic feet for natural gas consumed.

That no application has been made, or presented to, or filed with the Public Utilities Commission of the State of Kansas, by the said defendant, the Wyandotte County Gas Company, for permission to increase the price of natural gas to the consumers thereof in the said cities of Kansas City and of Rosedale, and in Wyandotte County, Kansas.

That the Public Utilities Commission of the State of Kansas has not in any way consented to, permitted or ordered any advance or other charge whatever in the price to be paid for natural gas by the consumers thereof in the said cities of Kansas City or Rosedale, or in Wyandotte County, Kansas.

That the said defendant has wrongfully and unlawfully advanced and increased the price to be paid by consumers of natural gas in the said cities of Kansas City and Rosedale and in Wyandotte County, Kansas, from 25 cents a thousand cubic feet to 27 cents per thousand cubic feet, and is now collecting the said price of 27 cents per thousand cubic feet from the consumers thereof in said cities and in said county, and will continue so to collect the same unless enjoined and restrained by this honorable court from so doing.

That said plaintiff, and the consumers of natural gas in said cities and in said county are without remedy to prevent the increase in the price of natural gas to the consumers thereof in said
32 cities and in said county until consent thereto or permission therefor shall have been obtained from the Public Utilities Commission of the State of Kansas, unless this honorable court shall restrain the said defendant from so doing.

Wherefore, said plaintiff prays that said defendant and its officers, agents and employees be perpetually enjoined and restrained from advancing the price of natural gas to the consumers therefor in the city of Kansas City and of Rosedale, and in Wyandotte County, Kansas, or collecting a greater price than was collected on January 1, 1911, until consent to such increase, or permission therefor shall have been obtained from the Public Utilities Commission of the State of Kansas as is provided by law, and that until the final determination of this action the said defendant and its officers, agents and employees be enjoined and restrained from increasing the price of natural gas to the consumers thereof in said cities and in said county, or collecting a greater price than was collected on January 1, 1911, without first having obtained consent thereto or permission therefor, from the Public Utilities Commission of the State of Kansas, and that said plaintiff do recover its costs herein, and that it do have such other and further relief as may be deemed just in the premises.

JOHN MARSHALL,
Attorney for Public Utilities Commission of Kansas.

Restraining Order.

A restraining order was granted January 1, 1912, ordering:

That said defendant, its officers, agents and employees, be re-

strained from in any way increasing the price of natural gas to the consumers thereof in the cities of Kansas City and Rosedale, in Wyandotte County, Kansas, and to consumers thereof in Wyandotte County, Kansas, or collecting a greater price than was collected on January 1st, 1911, until the further order of this court, or until said defendant shall have obtained from the Public Utilities
33 Commission of the State of Kansas consent or permission to so increase the price of natural gas to the consumers thereof in said cities and in said county.

Motion to Dissolve Restraining Order.

Now comes the defendant and moves the court to dissolve the restraining order issued herein for want of prosecution, and for the further reason that said suit is without merit in law, fact or equity, and that the defendant is suffering great and irreparable inconvenience, loss and damage by reason thereof as appears from the affidavits filed herewith.

J. W. DANA,
Attorney for Defendant.

Endorsed: Filed Jan. 19, 1912.

In support of this motion appellant filed the following affidavits omitting formal parts to-wit:

Affidavit of W. H. McKenzie.

Filed Jan. 19, 1912.

W. H. McKenzie, being first duly sworn, deposes and says: That he is General Manager of The Wyandotte County Gas Company; that said company has approximately Eighteen Thousand meters installed supplying consumers; that it is necessary for the company to maintain 18,000 separate accounts with its consumers; that the usual or normal amount of delinquents at this time of the month during this time of the year is not to exceed $2,500.00, but that by reason of the confusion of the consumers over the restraining order issued in this case there are today outstanding for the current month $6,300.00 of delinquent bills, which should have been paid on or before the 10th day of this month; that it is practically impossible to get these bills collected while the confusion of rates prevails; that the company is losing large sums of money by the shifting and moving of consumers before payment or collection of said bills;
34 that a large amount of his monthly collections is remitted by check, and was on the 10th day of this month so remitted, but that by reason of the order issued herein the company returned over 800 of said checks to its consumers, and is now continuously and daily returning such checks by reason of said restraining order, and that large numbers of said consumers have failed and neglected, and this affiant believes, will refuse to return checks in the proper amounts or remit or pay for said bills; that by reason thereof, the

company is put to interminable confusion, annoyance, discord and expense in collecting its bills and dealing with its patrons and consumers; that the additional expense and work upon its books in changing said accounts with said consumers is growing more complicated and increasing in magnitude daily; that the clerks in the office are being worked greatly overtime, in many cases double time to care for said patrons and accounts; that over a thousand letters have necessarily been written to patrons explaining conditions at great expense; that at least $25.00 per day for extra clerical work is being expended; that it will take the office force fully thirty days to adjust the confusion now existing if said restraining order were dissolved or made permanent today; that the order restraining the collection of said two cents amounts to approximately $5,280.00 per month, and that other expense and loss incurred by reason of the premises has amounted to at least $3,000.00 and is rapidly increasing.

Affiant further says that not only the company suffers and is inconvenienced by this proceeding, but that large numbers of its consumers are also injured thereby; that the majority of its consumers are persons of ordinary means working for a daily or weekly wage; that they plan on paying their gas bills on a day certain out of certain specific earnings; that if they are not paid at said times and on said dates the moneys are usually expended for other things, and the consumer is unable to pay the delinquent bill out of his next week's or month's wage, and by reason thereof is thrown in default and subjected to being deprived of his gas; that many patrons and consumers have expressed their desire for the company to receive their bills in full, and are annoyed and harrassed by the conditions prevailing, and that by reason of the promises, not only the defendant company, but its patrons, and consumers who honestly want to pay their just bills are inconvenienced, harrassed and inestimably damaged by the indefinite continuance in force of said restraining order.

And further affiant saith not.

W. H. McKENZIE.

Affidavit of M. J. Barry.

Filed Jan. 23, 1912.

M. J. Barry, being first duly sworn, deposes and says: That he is the Assistant Secretary of The Wyandotte County Gas Company, and knows the manner of conducting the business of said company and is in charge of the office force and details of the clerical work of said company; that the company has 18,000 consumers, and that it is necessary to keep separate detailed accounts for each of said consumers; that on the 15th day of November, 1911, notices were mailed to each of said 18,000 consumers of gas advising said consumers that the price of gas fixed by the ordinance authorizing the company to do business in the city would be twenty-seven cents per thousand cubic feet on and after November 19th, 1911, a true and

correct copy of said notice being hereto attached marked Exhibit "A" and made a part hereof.

That pursuant to said notice the company at great expense printed stationery, bills, account books, etc., in conformity with said notice for the purpose of collecting said twenty-seven cents, and sent out printed bills to its consumers figured on the basis of twenty-seven cents per thousand cubic feet for all gas consumed since said 19th day of November, 1911.

Affiant further says that on and after said 19th day of November 1911, the company collected gas bills for its consumers at the price of Twenty-seven Cents per thousand cubic feet and continued so to do up until the 30th day of December, 1911, at 8:30 o'clock a. m., at which time it resumed the collection of bills at the rate of Twenty-five Cents per thousand cubic feet by reason of an erroneous impression obtained from an order of the District Court of Shawnee County directed to the Kansas Natural Gas Company in a suit pending in said court.

:36 That thereafter it discovered its error in assuming that said restraining order of the District Court of Shawnee County, Kansas, was directed against the company and on January 2, 1912, at 8:30 o'clock a. m., resumed the collection of its bills pursuant to notices and bills sent out to its consumers and the price fixed by its ordinance contract at the price and rate of Twenty-seven Cents per thousand cubic feet, and that on said January 2, 1912, it caused to be published a notice in all new-papers of general circulation in Wyandotte County, Kansas, to the effect that it would resume the collection of gas bills at the rate of Twenty-seven Cents per thousand cubic feet, a copy of said notice being hereto attached marked Exhibit "B" and made a part hereof, and that it continued to collect at said rate of Twenty-seven Cents per thousand cubic feet until 12:00 o'clock noon of January 4th, 1912, at which time or shortly prior thereto a restraining order issued in the above entitled cause was served upon W. H. McKenzie, General Manager of the company.

Affiant further says that from noon of January 4th, 1912, until 5:00 o'clock of said date, the remainder of the business hours thereof, the company received no payments which were being tendered by its consumers; that approximately 100 persons during said afternoon tendered payment at Twenty-seven Cents per thousand cubic feet, and that numbers of said persons declared their intention not to pay their bills thereafter, stating that they had come to the office for the purpose of making payment and were in the habit of doing their shopping and paying their bills on a certain day of the month and would not call for further payment.

Affiant further says that on January 5th, 1912, at 8:30 o'clock a. m., it resumed collection of bills at the price and rate of Twenty-five Cents per thousand cubic feet in obedience to said restraining order issued herein; that it issues to its consumers a receipt on account of said bills as per copy hereto attached marked Exhibit "C" and made a part hereof.

Affiant further says that a good many consumers refuse and object to pay their bills so receipted, and insist on receipts in full for

their bills or decline to pay them altogether, and by reason
37 thereof the company is put in a position where it can neither demand payment or shut off the supply of gas for non-payment.

Alliant further says that the usual and normal amount of delinquent bills at this time of the month during the winter season does not exceed the sum of $2,500.00, but that by reason of the confusion resulting from the continuance of the restraining order herein there are today outstanding for the current month delinquent gas bills in the sum of $6,300.00, more than half of which would have been paid on or before the 10th day of the month in regular and due course of business had it not been for said restraining order, and that it is practically impossible to secure the payment of these bills while the confusion in the price of gas prevails.

Alliant further says that the average bill of its consumers for the winter months is $4.08 per consumer; that said consumers are in a very large per cent wage earners receiving a daily or weekly wage and plan on paying their bills at particular and stated times, and that unless said bills are paid at such times as they had planned the moneys are expended for other purposes and the consumer is confronted with a two months' bill at one time, and is usually unable to meet and pay the same, and by reason thereof is subjected to the liability of losing the use of gas.

Alliant further says that out of its 18,000 consumers there are but 1,500 who have made cash deposits to secure their bills, and that said deposits on an average are not sufficient to cover more than one month's bill; that the total sum of consumers' deposits in the hands of the company at this time does not exceed the sum of $11,000.00, and that said sum is security for only 1,500 of said total 18,000 consumers; that there are 16,500 consumers having no cash security on deposit with the company for their monthly bills, and that the only practicable way of securing payment of bills and giving the proper and efficient service to consumers of the character served by this company is obtained by promptness and carefulness in the regular course of conducting the business; that under the method of conducting the company's business in sending out bills and notices of delinquency and shutting off notices, the time consumed in such necessary procedure enables the average consumer,
38 if he is so dispose, to get the use of gas for practically two months without any security for payment whatsoever, and that when the regular course of business is interrupted by any confusion whatever, such as restraining orders or disputes about bills, it is impossible for the company to make collections and serve its consumers properly.

Alliant further says that he is constantly in the office of the company during business hours; that it is his duty to meet and converse with patrons personally, and that out of the 18,000 consumers of this company there was practically no complaint or objection to the price of twenty-seven cents for said gas as fixed by the ordinance contract therefor, and that the confusion, discord and inconvenience caused by the issuance of the restraining order herein has been conducive to more actual complaint on the part of the consumers than

any other cause known to this affiant, and this affiant verily believes tha it will be to the best interests of the consumers at large if they are permitted to pay their bills at the rate of twenty-seven cents per thousand cubic feet pending this litigation.

And further affiant saith not.

M. J. BARRY.

"EXHIBIT A."

The Wyandotte County Gas Company.

Husted Building, Kansas City, Kansas.

To Our Consumers:

DEAR SIR: November 19th, 1911, marks the end of the first five-year period mentioned in the Natural Gas Franchise, when natural gas may be charged for at the rate of 25 cents per thousand cubic feet.

For the five-year period following that date, the franchise provides that the price may be at the rate of 27 cents per thousand cubic feet.

The Kansas Natural Gas Company (the supply company), on account of the conditions of the gas fields, from which it obtains its supplies, has requested us to put into effect the 27 cent rate, as provided for in the franchise.

39 We are advised that the same rate is being put into effect in all the northern towns supplied by the Kansas Natural Gas Company.

We, therefore, notify you that after November 19th, 1911, natural gas will be 27 cents per thousand cubic feet.

Very truly yours,

W. H. McKENZIE,
General Manager.

"EXHIBIT B."

(Newspaper Clipping.)

November 15th, 1911.

Notice.

The Wyandotte County Gas Company of Kansas City, Kas., announces that the statement made last Saturday that the December gas bills would be collected at the 25-cent rate was made under a misapprehension. The Wyandotte County Gas Company is not a party to any suit brought in Kansas and is under no legal compunction to restore the rate to 25 cents, but was simply requested to do so by the Kansas Natural Gas Company, who said the order of court against that company must be obeyed. Which we now find may not be so. Bills will, therefore, be collected at the rate at which they were rendered.

"EXHIBIT C."

(Rubber Stamp.)

Payment on account of this bill is accepted at the rate of 25 cents per thousand cubic feet in obedience to restraining order issued by Judge Fischer of District Court of Wyandotte County, pending further order of the Court without prejudice to the Company's rights in the premises or its rights under the ordinance of the City.

Paid on Acct —.

THE WYANDOTTE COUNTY GAS CO.

Demurrer to Petition.

On January 18, 1912, the appellant demurred to the appellee's petition on the following grounds, to-wit:

1. The Court has no jurisdiction of the subject of the action, to-wit, fixing of the price of gas, the same having been fixed by ordinance and contract between the cities of Kansas City and Rosedale, and the defendant herein.

2. The plaintiff has no legal capacity to sue, in that exclusive jurisdiction over the subject of the price of gas and the furnishing and distributing of the same in Kansas City and Rosedale is by statute vested exclusively in the governing bodies of said cities, and that neither the state nor the Public Utilities Commission have any interest in the subject of this action or in the relief demanded.

3. That said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

Demurrer Overruled.

On January 27th this demurrer was overruled, and the defendant excepted.

Hearing for Temporary Injunction. Plaintiff's Evidence.

On the hearing of the application for the temporary injunction the plaintiff introduced in evidence its verified petition, extracts from the defendant's answer and the order of the Commission directing the bringing of the suit.

Stenographer's Notes.

Mr. MARSHALL: The restraining order was granted and time fixed in the order for presenting the application for a temporary injunction which, I believe, was a week ago today, or something like that. I don't remember just when. On account of a little ailment I was unable to be here then. There's only one defendant. The Wyandotte

County Gas Company has filed a demurrer, likewise an answer, and I apprehend, in the presentation of this matter, the Court would want to look into some of the things charged or set up in the answer, and also consider the demurrer; and it would be entirely agreeable to us if we could at this time submit the case finally on these grounds although the notice only contemplated the application for
41 temporary injunction pending the determination of the suit.

Mr. DANA: The defendant desires the matter presented on the demurrer to the petition and on the application for a temporary injunction, and that is all there is before the Court at this time.

Mr. MARSHALL: All right. The petition is verified, as I remember it.

The COURT: The demurrer, it seems to me, puts the burden on you. It is your demurrer, isn't it?

Mr. DANA: It is my demurrer, but the petition for temporary injunction precedes it.

The COURT: There's no dispute about the facts is there?

Mr. MARSHALL: No, I think not.

Mr. DANA: I think not.

The COURT: The ruling on the demurrer will practically settle the question.

Mr. DANA: Well, I don't think so because we are not admitting the allegations of the petition so far as the allegations of it are concerned.

(Here the demurrer to the petition is argued and taken under advisement and the case proceeds to the hearing on the application for a temporary injunction.)

Mr. MARSHALL: I presume it is up to us to show our case for temporary injunction.

The COURT: All right, go ahead.

Mr. MARSHALL: Let me have the files. Well, our petition is verified and I have here a certified copy of the order of the Board of Public Utilities with reference to bringing this action, and the affidavit that is filed there, there are certain parts of this affidavit made by Mr. McKenzie that we desire to offer, those parts of the affidavit that concern the manner in which these plants are constructed, the operation of the physical plant in Kansas City and Rosedale and in the county outside of the two cities.

Mr. DANA: I desire to interpose an objection to the order directing the bringing of this suit as incompetent, irrelevant, immaterial, and for the further reason it is not on file here within the rules.

The COURT: Overruled.

Mr. DANA: To which we except.

Mr. MARSHALL: There's certain affidavits here with refer-
42 ence to the increasing of the price. The defendant has also filed affidavit of Mr. M. J. Barry concerning certain matters with reference to the price of gas in January last and increasing the price of gas. I believe that is all.

Mr. DANA: To which the defendant demurs because it does not make a case in favor of the plaintiff.

The COURT: Objection overruled.

Mr. MARSHALL: I introduce the Order and Petition, if I did not a while ago. The state rests.

The COURT: Well, let that be submitted, then, and if you wish to introduce more evidence you may do so subject to the demurrer.

Mr. DANA: We offer in evidence the sworn answer, which is filed as an affidavit for the purpose of being used as an affidavit on the hearing of this application for a temporary injunction, and which is subscribed and sworn to by Mr. McKenzie. We also offer in evidence the affidavit of M. J. Barry, subscribed and sworn to on the 19th day of January, 1912, together with exhibits attached thereto, filed January 23rd, 1912. We also offer in evidence the affidavit of C. H. Waring, superintendent of the company, together with the plat marked "exhibit 'A' " attached thereto showing the property in the City of Kansas City, Kansas, and City of Rosedale. This affidavit was filed on the 18th day of January, 1912. We also offer in evidence the affidavit of M. J. Barry, subscribed and sworn to on the 18th day of January, 1912, and filed in this court on the 18th day of January, 1912, and we ask to have these marked as exhibits and considered introduced by the defendant. We also offer in evidence the affidavit of Mr. W. H. McKenzie, subscribed to on the 19th day of January, and filed in this case on the 19th day of January, 1912. We also offer in evidence the exhibits attached to the verified answer of Mr. McKenzie, or affidavit of Mr. McKenzie, which is the answer filed in the case, namely, Ordinance Number 6051, Kansas City, Kansas, and the acceptance thereof by the company on file in the office of the City Clerk of Kansas City, Kansas, and the exhibit attached thereto, and Ordinance Number 295 of the City of Rosedale, Kansas, and the endorsements upon both of said ordinances.

Now, the evidence, I guess, is all in.

The COURT: Is there anything else?

Mr. MARSHALL: We introduce a certified order of commis-
43 sion to appear and prosecute this action. (This order does not appear to have been filed or left with the stenographer but it is admitted that it was an order of the Public Utilities Commission directing its attorney to commence this suit.)

Mr. DANA: We object as incompetent, irrelevant and immaterial.

The COURT: Overruled.

Mr. DANA: To which we except.

Mr. MARSHALL: We offer all that part of the affidavit of M. J. Barry, found on the first page and on the second page and the third page and closing with the tenth line and the three exhibits attached to the affidavit. (See supra, affidavit filed in support of motion to dissolve restraining order.)

Mr. DANA: We object unless all of the affidavit goes in.

The COURT: Overruled.

Mr. DANA: To which we except.

The COURT: You may introduce any part you want to.

Mr. MARSHALL: The affidavit of M. J. Barry, to which reference was made, was filed on January 23rd, 1912; and of the affidavit of W. H. McKenzie, sworn to on the 18th of January, 1912, and filed

on the 18th day of January, 1912; we desire to introduce the caption and the opening paragraphs of the affidavit and the paragraph on page four, Number Eight. (See ante, this is the verified answer.)

Mr. DANA: May our objection appear as following the introduction of the evidence which we have heretofore made.

The COURT: You mean your demurrer, I suppose?

Mr. DANA: Yes, sir.

—. ——.

Mr. DANA: I don't want to impose on the good nature of the Court but I would like to have the Court know what is in these affidavits.

The COURT: Well, I don't think it will be necessary to read all of them, but you may inform me as to the substance of them.

Mr. DANA: I will state the substance as disclosed by these affidavits.

The COURT: You can read them later if there's any dispute about anything.

44 (After argument of the case the defendant makes the following application.)

Mr. DANA: I want to renew the application of the defendant at this time, at the submission of the case on the evidence and argument, and move the Court for an order modifying the restraining order heretofore issued in this case without bond, to the effect that the Public Utilities Commission, plaintiff, or State or whoever prosecutes this action be required to give bond indemnifying the defendant against loss, and in case the Court's not disposed to require the State to give bond, that the restraining order be dissolved, and in the event that the restraining order be not dissolved, that the defendant be permitted to give bond to the effect that it will refund to all consumers, paying at the rate of twenty-seven cents, the excess two cents in the event it shall be determined that the two cents was improperly or unlawfully collected, upon such terms as the Court shall fix in the order.

The COURT: Well, I don't think this matter should be kept under advisement for any great length of time; I do want time to examine some of these authorities, I don't think though it is necessary to examine all of them; a great many of them are to the same effect. I think I will be able to decide the case next Saturday, and that will only be the third of next month. I will not make an order of that kind but I will decide the case next Saturday, and will be as brief about it as possible.

Mr. DANA: We desire an exception to the Court's overruling our application for an indemnity bond, and an exception to the Court overruling our application to dissolve the restraining order, and except to the Court's refusing our application to put up a bond and collect at the 27 cent rate.

(The case is here taken under advisement on the demurrer to the petition and the application for a temporary injunction.)

Defendant's Evidence.

The defendant offered in evidence the verified answer, pleading a general denial, a plea to the jurisdiction of the Public Utilities
45 Commission, a claim of protection under the contract clauses of the Federal Constitution, and a showing that the plants in Rosedale and Kansas City were separate, distinct, isolated utilities situated and operated in said cities as separate units for the benefit of said cities and their inhabitants separately, and that the franchise-contracts of Rosedale and Kansas City, were granted and entered into prior to the passage of the act relating to Public Utilities, and definitely fixed the prices of natural gas for a period of twenty years.

Answer.

Now comes the defendant and without waiving its demurrer filed herein, files this, its answer, to be used as an affidavit on the hearing for a temporary injunction and admits the official character of the relator and the members of the Public Utilities Commission of Kansas; the corporate existence of the defendant, The Wyandotte County Gas Company, and the municipalities of Kansas City and Rosedale, Kansas, and in answer to the petition of the plaintiff filed herein, states:

I. For its first answer and defense to the plaintiff's petition defendant denies the truth of each and every statement, allegation and averment of fact in said petition made and contained, except such as are hereinbefore admitted.

II. For a second and further answer and defense to plaintiff's petition, the defendant alleges that it is now and long prior hereto has been engaged in the business of furnishing and delivering natural gas to the City of Kansas City, Kansas, and its inhabitants, patrons of this defendant, by means of a certain natural gas plant and distributing system situated and operated wholly or principally within the corporate limits of the City of Kansas City, Kansas, and principally operated for the benefit of said city and its people, in, along and upon the public streets, avenues, and boulevards of said city, under and pursuant to authority so to do duly granted by Ordinance No. 6051 of the City of Kansas City, Kansas, and the accept-
46 ance thereof, true and correct copies thereof being hereto attached, marked Exhibits "A" and "A1," and made a part hereof.

III. That the aforesaid gas plant, distributing system or utility so situated and operated within the corporate limits of the City of Kansas City, Kansas, for the benefit of such city and its people as aforesaid is wholly distinct, separate, segregated and apart from any other gas plant, distributing system, property or utility owned, controlled or operated by this defendant in the State of Kansas or elsewhere.

IV. Defendant further alleges that it is now, and long prior

hereto has been, in like manner, engaged in the business of furnishing and delivering natural gas to the City of Rosedale and its inhabitants, patrons of this defendant, by means of the operation of another certain natural gas plant, distributing system, or utility situated and operated wholly or principally within the corporate limits of said City of Rosedale and principally operated for the benefit of said city and its people, in, along and upon the public streets, avenues and boulevards of said city, under and pursuant to contract between said City of Rosedale and this defendant, authority so to do duly granted by Ordinance No. 295 of said City of Rosedale, a true and correct copy thereof being hereto attached, marked Exhibit "B" and made a part hereof.

V. That the defendant gas plant, distributing system or utility so situated and operated within the corporate limits of the City of Rosedale, for the benefit of such city and its people is wholly distinct, separate, segregated and apart from any other gas plant, property or utility owned, controlled or operated by this defendant in the State of Kansas or elsewhere.

VI. Defendant further alleges that there is no physical connection or relation whatsoever existing between its aforesaid gas plant, system or utility situated and operated in the City of Kansas City, Kansas, and its aforesaid gas plant, system or utility situated and operated in the City of Rosedale; that there are no mains, pipes or connections, owned or operated by the defendant extending from one city to the other or from one plant, system or utility to the other; that each of said plants, systems or utilities receives its supply of natural gas from the transportation pipe line system of the Kansas Natural Gas Company by separate mains at separate and dis-
47 tinct points and through separate and distinct meters, taps and connections; and that there is no physical relation existing between the two said utilities, either in regard to the supply of gas, the metering or the distribution thereof.

VII. Defendant further alleges that there are no mains or pipes extending from its said plant, distributing system or utility in Kansas City, Kansas, beyond the corporate limits of said city; that it supplies no consumers in Wyandotte County or elsewhere, outside the corporate limits of Kansas City, Kansas, from its said system or plant in said city; that there are no mains or pipes extending from its said plant, system or utility in Rosedale, Kansas, beyond the corporate limits of said city; and that it has no property or consumers outside the corporate limits of either Rosedale or Kansas City, except Six (6) small service pipes serving Eleven (11) consumers in Wyandotte County, supplied directly from said transportation line of the Kansas Natural Gas Company, and in no way connected with the distributing systems of Kansas City or Rosedale, Kansas.

VIII. Defendant further alleges that all the natural gas sold and distributed by this defendant in Kansas City, Kansas, by means of its aforesaid plant, system or utility in said city is delivered into the said distributing system of this defendant within the corporate limits of Kansas City, Kansas, and at the station on the transporta-

tion lines of the Kansas Natural Gas Company, immediately south of the south approach to the Fifth street bridge crossing the Kansas river, and thence conducted north across said bridge by a flow line owned by this defendant and constituting a part of its said Kansas City, Kansas, unit, system or utility.

That all the gas sold and distributed by this defendant in the City of Rosedale, Kansas, by means of its said unit, plant, system or utility in said city is delivered by the Kansas Natural Gas Company into the said plant, system or utility of this defendant located and situated within the corporate limits of said City of Rosedale at three several stations within the corporate limits of said city, and from thence distributed through the plant, system or utility of this defendant located and operated in said City of Rosedale, and that there is no physical connection or relation between the point or source of supply of said two units, plants, systems or utilities.

48 IX. Defendant avers that by reason of the foregoing facts neither this defendant nor its aforesaid gas plants, distributing systems or utilities so situated and operated in Kansas City and Rosedale, Kansas, as aforesaid, are governed by the provisions of the act relating to public utilities and creating the Public Utilities Commission; and that said Public Utilities Commission has no control or jurisdiction over this defendant, its said business or its said gas plants, distributing systems or utilities in said cities, and that no order or consent of said Public Utilities Commission is or was necessary, proper or authorized, as claimed in the plaintiff's petition, to entitle this defendant to now charge and collect from its consumers in Kansas City and Rosedale, Kansas, the sum or price of Twenty-seven Cents per thousand cubic feet or any other price for the natural gas furnished and delivered to said patrons by this defendant.

X. For a third and further answer and defense to the plaintiff's petition, the defendant alleges and charges the fact to be that, as will hereinafter more fully appear, the present net price of Twenty-seven Cents per thousand cubic feet or any other price for the nished by defendant to domestic consumers in Kansas City and Rosedale, Kansas, complained of in the plaintiff's petition, was, on said January 1st, 1911, and long prior thereto had been, duly fixed by contract embodied in and evidenced by said Ordinances No. 6951 of Kansas City, Kansas, and 295 of Rosedale, Kansas; and that no order of the Public Utilities Commission of Kansas could issue to change or fix any other compensation for the service rendered by this defendant to its patrons, to-wit, the price of natural gas, under and pursuant to said act relating to Public Utilities without impairing the obligations of said contracts, and taking the defendant's property in said contracts without due process of law, and denying to this defendant the equal protection of the laws.

XI. Defendant avers that on or about the 28th day of November, 1908, by and with the consent and approval of the municipal authorities of Kansas City and Rosedale, Kansas, it purchased for a good and valuable consideration, and acquired the aforesaid distributing plants and the franchises and contracts evidenced by said

Ordinance No. 6051 of Kansas City, and No. 295 of Rosedale, Kansas, together with all the rights, privileges and immunities
49 thereunto belonging and appurtenant, and that it is now the sole and exclusive owner and holder of the above said distributing plants, properties, contracts, franchises and appurtenances.

XII. Defendant further alleges that natural gas was first furnished in Kansas City, Kansas, under said contract Ordinance No. 6051 in the month of August, 1905; and that under Section 3 thereof, this defendant would be entitled to charge domestic consumers of such gas in said city the price and rate of Thirty-five Cents per thousand cubic feet, except for the provisions of paragraph 14, Section 8 thereof, which precludes this defendant from charging any greater price for natural gas in Kansas City, Kansas, than that thereafter fixed by a certain ordinance of Kansas City, Missouri, authorizing the use of the pipes of the Kansas City, Missouri, Gas Company for the distribution of natural gas; that under said Missouri ordinance natural gas is now furnished to Kansas City, Missouri, and its inhabitants at the net price of Twenty-seven Cents per thousand cubic feet, and that by reason thereof this defendant is now, and was on the 1st day of January, 1911, and long prior thereto had been entitled to collect from its domestic consumers of natural gas in Kansas City, Kansas, the price fixed by said Ordinance No. 6051 of Kansas City, Kansas, as limited by said Missouri ordinance, said provisions of said Ordinance No. 6051 being as follows:

"SEC. 3. Said grantee, its successors and assigns, (this defendant) shall be entitled to charge and collect from consumers of such gas, during the period of 2 years from and after natural gas is first furnished hereunder, at the rate of not to exceed twenty-five (25) cents per thousand cubic feet, and during the period of one year next thereafter at the rate of not to exceed twenty-eight (28) cents per thousand cubic feet, and during the period of one year next thereafter, at the rate of not to exceed twenty-nine (29) cents per thousand cubic feet, and during the period of one year next thereafter, at the rate of not to exceed thirty (30) cents per thousand cubic feet, and thereafter, during the period of the aforesaid grant, at the rate of not to exceed thirty-five (35) cents per thousand cubic feet;"

SEC. 8, paragraph 14, Ordinance No. 6051: "If any ordinance of the City of Kansas City, Missouri, authorizing the use of
50 the pipes of the Kansas City, Missouri, Gas Company for the distribution of natural gas under which said pipes of said company shall be applied to the distribution of natural gas in Kansas City, Missouri, shall fix lower rates for natural gas for lighting heating power or manufacturing purposes than those fixed by this ordinance or a less minimum monthly bill than that fixed by this ordinance, the grantee shall file in the office of the City Clerk of Kansas City, Kansas, a certified copy of such ordinance of the City of Kansas City, Missouri, (and if the grantee shall fail or refuse to so file such certified copy within thirty days after natural gas is sold in Kansas City, Missouri, thereunder, any citizen of Kansas City, Kansas, may so file the same), and from and after such filing the grantee shall charge no greater rates for said natural gas or no

greater minimum monthly bill, as the case may be, than those fixed in such ordinance of the City of Kansas City, Missouri, so long as such rates shall there be in force under such ordinance, and natural gas there sold according to the same."

XIII. Defendant further alleges that within Thirty days after the passage of said Missouri ordinance authorizing the use of the pipes and mains of the Kansas City, Missouri, Gas Company for the distribution of natural gas therein, the defendant herein duly filed in the office of the City Clerk of Kansas City, Kansas, a duly certified copy of said ordinance of Kansas City, Missouri, and that ever thereafter the pipes of the Kansas City Missouri Gas Company were and now are used for the distribution of natural gas in said City under said ordinance of Kansas City, Missouri, Section 13 thereof relating to price being as follows:

SEC. 13. Missouri Ordinance: "The said grantees shall be entitled to charge and collect from consumers of such gas, during the period of five years from and after natural gas is first furnished hereunder at the rate of not to exceed twenty-five cents per thousand cubic feet, and during the period of five years next thereafter at the rate of not to exceed twenty-seven cents per thousand cubic feet, and thereafter, during the period of the aforesaid grant (being thirty years) at the rate of not exceeding thirty cents per thousand cubic feet."

XIV. Defendant further alleges that natural gas was first furnished in Kansas City, Missouri, under said ordinance of that
51 city in the month of November, 1906; and that the first period of five years mentioned in said Section 13 expired in the month of November, 1911; that natural gas is now being distributed and sold in Kansas City, Missouri, through the pipes of said Kansas City Missouri Gas Company under said ordinance at the net rate of Twenty-seven cents per thousand cubic feet, and by reason thereof and under the terms and provisions of said Ordinance No. 6051 of Kansas City, Kansas, relating thereto this defendant is now entitled to charge and collect from its domestic consumers of natural gas in Kansas City, Kansas, the compensation rate or charge so fixed on January 1st, 1911, and long prior thereto, at the net price of Twenty-seven cents per thousand cubic feet.

XV. Defendant further alleges that the present net price of Twenty-seven Cents per thousand cubic feet for natural gas furnished by this defendant to domestic consumers in Rosedale, Kansas, was on said January 1st, 1911, duly fixed and determined by Section 2 of said Ordinance No. 295 of Rosedale, Kansas, which reads as follows:

"SEC. 2. Under the authority hereby granted, the said grantees shall furnish gas to the said city and its inhabitants at a rate which for natural gas shall not for the first five years next ensuing after the acceptance of this ordinance by the grantees, exceed thirty-five (35) cents for each one thousand (1000) cubic feet, and for the remaining years that the said grantees shall furnish natural gas under this ordinance, grantees shall furnish such natural gas at a rate not to exceed forty (40) cents for each one thousand (1000) cubic feet; provided, however, that the said grantees may charge a minimum

rate of fifty (50) cents per month for service, said minimum rate to be deducted from the monthly gas bills when the same are in excess of fifty (50) cents and shall be the only charge when the monthly gas bill is for a less amount than fifty (50) cents; and provided further that the said grantees, their successors and assigns, shall not at any time during the life of this franchise, charge or collect, from the citizens or inhabitants of said city, any greater charge or price for either natural or manufactured gas, than is charged or collected therefor, for like service, during the same period, in Kansas City, Kansas."

XVI. For a further and fourth answer and defense to the
52 plaintiff's petition, the defendant alleges that the real parties in interest in the above entitled cause are the members of the Public Utilities Commission, and that said members have no legal capacity to sue, commence or prosecute this action in the name of the State of Kansas.

XVII. For a further and fifth answer and defense to the plaintiff's petition, the defendant alleges that this court has no jurisdiction of the subject of this action for the reason that the determination of the price of gas and the rate to be charged therefor to consumers thereof in Kansas City, and Rosedale, Kansas, is a legislative or administrative function or question and not a judicial function or question and is vested by statute exclusively in the Board of Commissioners of Kansas City, Kansas, and the Mayor and Council of Rosedale, Kansas.

XVIII. For a further and sixth defense to the plaintiff's petition, defendant alleges that the plaintiff's petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

XIX. For a further and seventh answer and defense to the plaintiff's petition, defendant alleges, that by reason of the premises, the said act relating to public utilities and the construction placed thereon by plaintiff and relator herein and the commencement and prosecution of this suit are each and all in conflict with and in violation of the following provisions of the constitution of the United States of America, to-wit:

(*a*) Sec. 10 of Art. 1. "No state shall * * * pass any law impairing the obligations of contracts."

(*b*) Art. 5 Amendments. "No person shall * * * be deprived * * * of property without due process of law; nor shall private property be taken for public use without just compensation."

(*c*) Art. 14 of Amendments. "No state shall make or enforce any law which shall abridge the privileges *of* immunities of citizens of the United States; nor shall any state deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

XX. Defendant further alleges that by reason of the premises, the construction placed upon said act relating to public utilities
53 by the plaintiff and relator herein, the commencement and prosecution of this suit and the issuance of the restraining

order herein, it has been damaged in the sum of approximately $6,000.00, and that it will suffer great and irreparable damage by reason thereof during the pendency of this suit, the exact amount of which this defendant is unable to state, but alleges in the sum of approximately $50,000.00, and that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

Wherefore, The defendant having fully answered prays for judgment in its favor and against the plaintiff and for its costs herein expended.

J. W. DANA,
Attorney for Defendant.

STATE OF KANSAS,
County of Wyandotte, ss:

W. H. McKenzie, being first duly sworn upon his oath, deposes and says: That he is the General Manager of The Wyandotte County Gas Company; that he has read and knows the contents of the foregoing answer, and that the statements, allegations and averments of fact therein made and contained are true.

And further affiant saith not.

W. H. McKENZIE.

Subscribed and sworn to before me this 18th day of January, 1912.

MAUDE HAYS,
Notary Public.

My commission expires Feb. 23, 1914.

Endorsed on back: Filed Jan. 18, 1912.

Ordinance No. 6051.

An ordinance relating to, and providing for the supplying of the City of Kansas City, Kansas, and its inhabitants, with natural gas by the Wyandotte Gas Company, its successors and assigns.

Be It Ordained by the Mayor and Councilmen of the City of Kansas City, Kansas:

SECTION 1. For and in consideration of the benefits to the City of Kansas City, Kansas, and its inhabitants, and upon the terms and conditions hereinafter prescribed, there is hereby granted unto the Wyandotte Gas Company, its successors and assigns, the per-
51 mission, right, privilege and authority, for the period of twenty (20) years from and after the passage and publication of this ordinance, within the present or any future corporate limits of the City of Kansas City, Kansas, to supply, sell and furnish natural gas for the purpose of supplying the City and its inhabitants with natural gas for lighting, heating, power and manufacturing purposes, and the use of the streets, avenues, alleys, public grounds, public bridges and viaducts of the City for the purpose of laying

mains, pipes, regulators and appliances and erecting and maintaining lamp posts and illuminating devices to be used in the furnishing or supplying said City and its inhabitants with natural gas for lighting, heating, power and manufacturing purposes, upon the conditions specifically provided for herein.

SECTION 2. Said grantee (which term whenever used in this ordinance shall mean and include the Wyandotte Gas Company, its successors and assigns) shall, during the term of the aforesaid grant, have the right and privilege of establishing, constructing, maintaining and operating within the City of Kansas City, Kansas, their works, holders and other apparatus necessary and sufficient in size and capacity to supply the City and its inhabitants with natural gas, and shall also have the right and privilege of attaching their mains and pipes, under the direction and control of the City Engineer, to any bridge or viaduct over which the City has or may hereafter acquire the power to grant such right and privilege.

SECTION 3. Said grantee, its successors and assigns, shall be entitled to charge and collect from consumers of such gas, during the period of two years from and after natural gas is first furnished hereunder at the rate of not to exceed twenty-five (25) cents per thousand cubic feet, and during the period of one year next thereafter, at the rate of not to exceed twenty-eight (28) cents per thousand cubic feet, and during the period of one year next thereafter, at the rate of not to exceed twenty-nine (29) cents per thousand cubic feet, and during the period of one year next thereafter, at the rate of not to exceed thirty (30) cents per thousand cubic feet, and thereafter, during the period of the aforesaid grant, at the rate of not to exceed thirty-five (35) cents per thousand cubic feet; and may also make special contracts with consumers at less than
55 the general rates then in force, based upon the amount of gas used and the conditions of the contract, which special rates shall be the same to all consumers using the same amount of gas under the same contract conditions, and schedules of such special rates and the contract conditions shall be filed with the City Clerk, and each and every change therein shall also be filed with the City Clerk and be open to public inspection, and if the demand from special rate consumers threatens the general supply to the city and regular rate consumers, the grantee may shut off the supply from special rate consumers, in whole or in part, and if the grantee fails or refuses so to do, the City Council may by resolution require the grantee so to do; provided, always, that the said grantee shall have the right to charge two (2) cents per thousand cubic feet additional to all consumers who are in arrears for a period longer than ten (10) days; and provided further, that the grantee may charge and collect from each person who has a meter installed a minimum monthly bill of not to exceed 50 cents; provided, however, that if the bill for natural gas consumed in any month shall at the rate then in force exceed the sum of 50 cents, such consumer shall not be charged any minimum bill for that month.

SECTION 4. Said grantee, its successors and assigns, shall have the right and privilege to charge the City of Kansas City, Kansas,

any sum not exceeding five dollars ($5) per year, payable monthly, for the natural gas furnished said City for each street lamp, said lights to burn on the "All Night" schedule, the City to furnish burners and mantles and light, extinguish, clean and maintain the same; and the City hereby reserves the right, by resolution of the Mayor and Council, to order lamp posts for street lights located at any place within the city on the mains of the said grantee for the purpose of lighting the streets and public grounds of said city, same to be paid for at the price aforesaid, and to order the same removed to some other location in the city at any time, or to remove said lamps altogether; said removal to some other location to be done at a reasonable cost to the city.

SECTION 5. Said grantee, its successors and assigns, shall have the right to cut off the natural gas temporarily from its mains and pipes, or from any portion thereof, for the purpose of needful repairs or extensions of its works, or while repairs or extensions are being made to the pipes or apparatus by which it obtains its supply of natural gas, and shall not be liable to said city or any consumer for any damage occasioned by said temporary suspension of the supply of natural gas; provided, that whenever possible, notice of such cutting off of the supply shall be given to consumers by publishing in one or more daily newspapers in this city and in Kansas City, Missouri; and provided further, that when natural gas shall be voluntarily cut off by said grantee from any city street lamp, causing the temporary extinguishment of light from any such street lamp, the grantee, its successors and assigns, shall locate some other artificial light at the place of said natural gas street light so temporarily extinguished, without cost to the city.

SECTION 6. For the purpose of supplying natural gas to the city and its inhabitants, the grantee may use its existing mains, pipes, reservoirs, and appliances, including any additional mains, pipes and appliances laid or acquired up to the time natural gas is furnished; provided there shall be no interruption in the supply of manufactured gas to any consumer until the grantee is prepared to supply him with natural gas, and provided further, that while natural gas is being supplied under this franchise, the grantee shall be relieved of any obligation to supply manufactured gas. But nothing herein contained shall be held or considered to relieve the grantee from any other obligation, provision or condition of Ordinance No. 5637, under which the grantee is now operating, except that while natural gas is being furnished hereunder the grantee shall not be required to make the reports and payments in Section 3 of said Ordinance No. 5637. Should the grantee find at any time hereafter during the life of this franchise, that the supply of natural gas at points contiguous to the mains from which it obtains its supply, or in the natural gas fields of Southwestern Kansas, is inadequate to warrant it in continuing to supply natural gas under the terms of this ordinance, it shall not be longer required so to do, but may proceed to furnish and supply manufactured gas in accordance with the terms and provisions of said Ordinance No. 5637.

SECTION 7. The city shall enact such ordinances as may be

deemed just by the Mayor and Council to protect the grantee, its successors and assigns, and their works and property, from damage, imposition and fraud, and to prevent unnecessary waste of
57 natural gas, and said grantee, its successors and assigns, shall have power to make all reasonable and needful rules and regulations for the collection of their revenues, and shall be permitted to add two (2) cents per thousand cubic feet to the price of natural gas to consumers hereinbefore fixed, but shall deduct said two (2) cents per thousand cubic feet from the bills of all consumers who pay their bills on or before the tenth day of the month next following the month in which the natural gas was used, which said bills shall be delivered at the place where the natural gas was used, unless otherwise requested by the consumer; and to make reasonable rules for the prevention of waste in the conduct and management of their business as may from time to time be by them deemed necessary and just.

SECTION 8. The rights, privileges and franchises herein granted are for the following considerations and upon the following conditions, to-wit:

1st. That the said grantee shall, within one year after filing its acceptance, be supplying natural gas on not less than twenty-five (25) miles of mains to all consumers thereon who have made application therefor, in compliance with its rules and regulations, and within eight (8) months thereafter shall be supplying natural gas to all consumers on its mains who have so made application, and shall, during the lifetime of this franchise, except as herein otherwise provided, continue to supply said city and its inhabitants with natural gas upon the terms and conditions and for the considerations herein provided; and shall locate lamp posts for street lights at any place within the city on the mains of said grantee, for the purpose of lighting the streets and public grounds of said city, whenever ordered so to do by resolution of the Mayor and Council, same to be paid for by the city as hereinbefore provided.

2nd. That on or before the first day of August in each year, said grantee, its successors and assigns, shall file in the office of the City Treasurer a report, under seal of the company, and verified by oath of its president, treasurer, superintendent or other managing officer, showing the amount of its gross receipts from the sale of natural gas to the city and private consumers during the six months ending the thirtieth day of June last preceding; and on or before the first day of February in each year, shall also file a report showing the
58 amount of its gross receipts from the sale of natural gas to the city and private consumers during the six months ending the thirty-first day of December then last preceding; and said grantee, its successors and assigns, shall, at the time of filing each of such reports, pay into the city treasury a sum equal to two (2) per cent. of its gross receipts from the sale of natural gas to private consumers.

3rd. That during the life of this franchise, the grantee, its successors and assigns, shall maintain a reservoir or holder within the corporate limits of the City of Kansas City, Kansas, sufficient in size

and capacity of storing seven hundred and fifty thousand (750,000) cubic feet of gas, and shall maintain said amount of gas constantly on hand for emergencies.

4th. After December first, 1905, the grantee, its successors and assigns, shall lay additional mains whenever and wherever the Mayor and Council may by resolution direct; provided, however, that said grantee shall not be required to lay or extend mains on any ungraded street, or to lay or extend mains on any graded street except where there is an average of one or more residents on said street to each one hundred (100) feet of the aggregate distance of any such extension of main pipe to be laid, who shall agree to take natural gas and shall have their houses piped therefor; but if any graded street is about to be paved under ordinances of the city, such main shall be laid ahead of the paving, without regard to the number of consumers thereon, and provided further, that said grantee shall not be required to lay or extend any mains except when the ground is free from frost. Said resolution directing the laying of additional mains, in accordance with this section, shall have appended thereto the signatures of the required number of prospective consumers, and every such resolution shall contain a provision that in case such prospective consumers or any of them fail, within thirty (30) days to enter into a contract with the grantee, as herein provided, such resolution shall not be enforced. If the grantee shall fail or refuse to comply with any such resolution for a period of ninety (90) days, after the approval of the same and after said consumers have made the contracts aforesaid, the grantee shall pay to the city the sum of five dollars ($5) per day for each and every day that such failure or refusal continues.

5th. All pipes and mains shall be located and laid so as
59 not to unnecessarily interfere with any pipes, mains, conduits or sewers existing at the time of such location or laying; and said grantee, its successors and assigns, shall hold the city harmless from any and all damages accruing from the negligence or mismanagement of its employés in the construction or operation of said works and the laying of said mains and pipes. There shall be no unreasonable or unnecessary obstruction of the streets, avenues, alleys or public grounds of the city, and the same shall be restored to their former condition as nearly and as soon as possible by the grantee, its successors and assigns, under the direction and control of the city engineer.

6th. That whenever the grantee, its successors and assigns, shall lay or maintain any of its mains and pipes upon any of the public bridges or viaducts of the city, as hereinbefore granted, said mains and pipes shall be so attached to any such bridge or viaduct as not to interfere with other public uses of the same, and the said grantee shall pay to the city annually, during the life of this franchise, the sum of one hundred dollars ($100) for each bridge and viaduct so used by said grantee.

7th. The said grantee shall, during the life of this franchise, perpetually maintain on deposit with the City Treasurer of Kansas City,

Kansas, the sum of one thousand dollars ($1,000) to be used by the city, at the order of the Mayor and Council by resolution, for the repair of any street, avenue, alley, pavement, curbing or sidewalk left out of repair by the grantee, its successors and assigns, in the laying of any of its mains or pipes; provided, that three (3) days before said sum or any part thereof shall be used for such purpose, the local managing officer of the grantee shall be notified in writing by the Street Commissioner or City Engineer of the necessity of such repairs.

8th. Within ten (10) days after the passage and publication of this ordinance, the grantee shall accept the same as hereinafter provided, and as an evidence of good faith, deposit with the City Treasurer of Kansas City, Kansas, the sum of twenty-five thousand dollars ($25,000) in cash at the time of said acceptance, and within thirty (30) days after said acceptance, shall file with the City Treasurer the bond of some responsible surety company, to be approved by the Mayor and Council, in the sum of one hundred thous-
60 and dollars ($100,000), running to the City of Kansas City, Kansas, conditioned that the grantee will within one year after filing said acceptance be supplying natural gas on not less than twenty-five (25) miles of mains to all consumers thereon who have made application therefor in compliance with its rules and regulations, and within eight (8) months thereafter be supplying natural gas to all consumers on its mains who have so made application. And in case of failure to so supply natural gas, the whole of said sums of one hundred and twenty-five thousand dollars ($125,000) shall be considered liquidated damages and not a penalty, and said twenty-five thousand dollars shall be appropriated to the uses of the city, and said one hundred thousand dollars shall be sued for and recovered by the city in any court of competent jurisdiction, which shall also be set forth in such bond. In case natural gas is so supplied, said bond shall be void and said twenty-five thousand dollars ($25,000) shall be repaid to the grantee, except any interest accrued on said twenty-five thousand dollars ($25,000), which interest shall be retained for the use and benefit of the city; provided, however, that if the laying of pipes by the grantee or the laying of pipes outside of the city or the delivering of natural gas at or within the corporate limits of the city by the grantee or by any person with whom the grantee may contract for its supply of natural gas shall be prevented, hindered or delayed by injunction or legal process of any kind against the grantee or such other person, or by labor strike, or by any cause beyond the control of the grantee, or such other person, the time consumed by such prevention, hindrance or delay shall be deducted from the time provided for herein for the supply of natural gas in the city as herein provided, and the time provided for herein for so supplying natural gas shall be correspondingly extended for a like period or periods.

9th. The grantee shall not, except as in this ordinance provided, without the consent of the city, evidenced by ordinance, sell, lease, or transfer its plant, property, rights, franchises or privileges herein

authorized to any person or persons, company, trust or corporation now or hereafter engaged, or for the purpose of engaging in supplying and selling natural gas in this city under any other ordinance or franchise or otherwise, and shall not at any time enter
61 into any combination with any person or persons, company or companies authorized by ordinance to sell natural gas in this city, concerning the rate or price to be charged for natural gas to be used by the city or private consumers; provided, however, that said grantee may convey all its rights, privileges and franchises herein granted to a corporation, its successors and assigns, to be organized under the laws of the State of Kansas, for the purpose of acquiring, building, con-tracting and operating the gas plant authorized under this ordinance, but this shall not authorize any other grantee to assign the franchise granted to it to any other company or person or persons to which or whom a franchise has been granted, and provided further, that notice of said conveyance and of any conveyance by said proposed assignee corporation, its successors and assigns shall be filed with the City Clerk of Kansas City, Kansas, within ten days after the execution thereof; and provided further, that the grantee, its successors and assigns, shall have the full, complete and unqualified right to assign and transfer this franchise and their property by way of mortgage, deed of trust, or other form of security in the nature of a mortgage or deed of trust, for the purpose of securing bona fide indebtedness and for the purpose of acquiring property and of raising funds to build, construct, equip and operate said plant, and to conduct the business thereunder.

10th. The grantee shall at its own expense bring connecting pipes for consumers to the lot line and construct shut-offs, and shall also supply and set meters for measuring natural gas free of charge to consumers, which shall however be and remain the property of the grantee, and freely accessible to it at all reasonable times, and consumers shall be responsible for negligently or wilfully injuring any meters.

11th. Upon the failure, neglect or refusal of the grantee, its successors or assigns, to comply with any of the substantial terms or conditions herein made and contained, this ordinance shall be subject to forfeiture in a regular proceeding brought on behalf of the City of Kansas City, Kansas, in any court of the State of Kansas having jurisdiction of the same, and the said grantee hereby agrees to waive the right to remove said cause to the Federal Court for original hearing. All rights, privileges and immunities not herein ex-
62 pressly granted or necessarily implied shall be reserved to the City, and the grantee shall take only such powers, privileges and immunities as are herein given by express grant or necessary implication.

12th. That said grantee shall, within ten (10) days after the passage of this ordinance, file in the office of the City Clerk of the said city a written acceptance of the terms, obligations and conditions set forth, which shall be approved by the Mayor and Council.

13th. As long as natural gas is furnished and sold to the inhabit-

ants of Kansas City, Kansas, under this franchise, the grantee shall in consideration of this grant furnish free to the city of Kansas City, Kansas, natural gas for light in the City Hall, City Prison, Police and Fire Stations and all other city buildings, including the Carnegie Library, provided all such lights shall be kept extinguished when not needed for illuminating purposes, the city to furnish its own burners, mantles, fixtures and appliances and maintain and keep the same in repair.

14th. If any ordinance of the city of Kansas City, Missouri, authorizing the use of the pipes of the Kansas City, Missouri, Gas Company for the distribution of natural gas under which said pipes of said company shall be applied to the distribution of natural gas in Kansas City, Missouri, shall fix lower rates for natural gas for lighting heating power or manufacturing purposes than those fixed by this ordinance or a less minimum monthly bill than that fixed by this ordinance, the grantee shall file in the office of the City Clerk of Kansas City, Kansas, a certified copy of such ordinance of the City of Kansas City, Missouri, (and if the grantee shall fail or refuse to so file such certified copy within thirty days after natural gas is sold in Kansas City, Missouri, thereunder, any citizen of Kansas City, Kansas, may so file the same), and from and after such filing the grantee shall charge no greater rates for said natural gas or no greater minimum monthly bill, as the case may be, than those fixed in such ordinance of the city of Kansas City, Missouri, so long as such rates shall there be in force under such ordinance, and natural gas there sold according to the same.

SECTION 9. This ordinance shall take effect and be in force
63 from and after its passage and publication in the Kansas City Gazette.

Passed in Council this 13th day of December, 1904.

P. J. NUGENT, *City Clerk.*

Approved December 14th, 1904.

T. B. GILBERT, *Mayor.*

(Acceptance duly filed December 15, 1904.)

City of Rosedale, Kansas.

Ordinance No. 295.

An ordinance, granting to R. A. Long and T. N. Barnsdall, their successors and assigns, for a period of twenty (20) years, the right to acquire, lay, maintain, repair, replace, relay and remove mains and pipe lines and all necessary regulators and appliances for the transportation of natural and manufactured gas to, in, and through the City of Rosedale, Kansas; together with the additional right to use all streets, avenues and public grounds of the City of Rosedale, Kansas, for the purpose of laying mains and pipes to supply and deliver to the said City and the inhabitants thereof gas for manufacturing, heating, illuminating and all other purposes for which natural or manufactured gas is, or may be used, during said period.

Be It Ordained By the Mayor and Councilmen of the City of Rosedale, Kansas:

SECTION 1. That the said R. A. Long and T. N. Barnsdall, their successors and assigns, be and they are hereby authorized and empowered for a period of twenty (20) years, from and after the passage of this ordinance, to construct, acquire, operate and maintain gas works in the City of Rosedale, Kansas, and to manufacture, sell and supply gas to said city and the inhabitants thereof, and to sell and supply natural gas to the said city and its inhabitants. That the said R. A. Long and T. N. Barnsdall, their successors and assigns, be and they are hereby authorized and empowered for a period of twenty (20) years, from and after the passage of this ordinance, to enter upon and dig and excavate in the streets, avenues, sidewalks, lanes, alleys, highways and public grounds of said city, as
64 the boundaries thereof are now, or may hereafter be, and to lay, maintain and operate in said streets, avenues, sidewalks, lanes, alleys, highways and public grounds below the surface thereof, and on the bridges and viaducts of said city, gas mains and gas pipes, with all necessary and proper attachments, connections, fixtures and appurtenances for the supply, distribution and transportation of either natural or manufactured gas to, in and through the said city, with the right at all times hereafter during said period to dig and excavate for the purpose of relaying, repairing, replacing and removing the said gas mains and pipes, or any portion thereof; and for the same purposes to make connections for consumers with such pipes and mains; Provided, However, that after the said gas mains and pipes are laid, all excavations shall be refilled, and all sidewalks and pavements shall be replaced and relaid with like material, and left in as good condition as before. Should said grantees fail or refuse to replace and restore said pavement, sidewalks and excavations within a reasonable time, then the same may be replaced and restored by the said city at the expense of said grantees.

SECTION 2. Under the authority hereby granted, the said grantees shall furnish gas to the said city and its inhabitants at a rate which

for natural gas shall not for the first five years next ensuing after the acceptance of this ordinance by the grantee, exceed thirty-five (35) cents for each one thousand (1000) cubic feet, and for the remaining years that the said grantees shall furnish natural gas under this ordinance, grantees shall furnish such natural gas at a rate not to exceed forty (40) cents for each one thousand (1000) cubic feet; Provided However, that the said grantees may charge a minimum rate of fifty (50) cents per month for service, said minimum rate to be deducted from the monthly gas bills when the same are in excess of fifty (50) cents and shall be the only charge when the monthly gas bill is for a less amount than fifty (50) cents; and Provided Further that the said grantees, their successors and assigns, shall not at any time during the life of this franchise, charge or collect, from the citizens or inhabitants of said city, any greater charge or price for either natural or manufactured gas, than is charged or collected therefor, for like service, during the same period, in Kansas City, Kansas.

65 SECTION 3. As long as natural gas is furnished and sold to the inhabitants of said City of Rosedale, Kansas, under this franchise, said grantees shall in consideration of this grant furnish free to the City of Rosedale natural gas for light and heat in the City Hall, and shall furnish along the line of its mains natural gas for street lamps at $6.00 per year for each burner using an incandescent mantle, provided that all lights in the City Hall shall be extinguished when not in use, and no street lamp shall be left burning during the day time. The city to furnish lamp posts, burners, mantles, fixtures and maintain and keep same in repair.

SECTION 4. No person, company or corporation shall be permitted to make any connection with any of the distributing or service pipes of said grantees, unless duly authorized by said grantees, their successors or assigns. And the said grantees shall have the right to charge ten (10) per cent penalty to consumers who are in arrears for a period longer than ten (10) days, and to shut off gas from any consumer who is in arrears for a longer period than fifteen (15) days, and the City shall pass such ordinance with penal provisions, and the grantees may adopt such rules and regulations, as shall be necessary to protect said grantees, their successors or assigns, from loss or damage by imposition of fraud, and to prevent the waste of gas.

SECTION 5. In constructing, repairing and operating said gas system or gas works, said grantees shall use every reasonable and proper precaution to avoid damage or injury to persons or property, and shall hold and save harmless the said city from damages, injury, loss or expense caused by the negligence of said grantees in constructing, repairing and operating said gas plant, or in paving, repaving or repairing any street.

SECTION 6. All prohibitions, amendments, forfeitures and all other provisions of this ordinance shall be binding upon said grantees, their successors and assigns, whether expressly so stated therein or not, and all rights, grants and privileges secured by this ordinance

to said grantees shall inure to the benefit of their legal and bona fide representatives, successors and assigns.

SECTION 7. Said grantees, their successors and assigns, shall be supplying gas in the City of Rosedale, Kansas, within six (6) months from the passage of this ordinance, otherwise this
65 franchise becomes null and void; Provided, However, that any delay in laying pipe lines in or to the said city, caused by injunction, legal proceedings or any other cause beyond the control of the grantees, shall not be counted as a part of the six (6) months.

SECTION 8. Within thirty (30) days from and after the time this ordinance shall take effect and become a law, the grantees shall file with the City Clerk of said city, their written acceptance of the provisions hereof, and in case of failure to file said acceptance within the time specified, then this ordinance shall ipso facto cease and become null and void.

SECTION 9. Before or at the time of the acceptance of this ordinance said grantees or others for their use and benefit shall file with the City Clerk a bond in the sum of Five Thousand Dollars ($5,000) to be approved by the Mayor of said city, guaranteeing to hold the city harmless from damage, injury, loss or expense to persons or property, caused by the negligence of the grantees in the construction, repair or operations of said gas plant, or in paving, repairing or repaving of any streets.

SECTION 10. This ordinance shall be in full force and effect from and after its passage, and the filing of said written acceptance in the office of the City Clerk by said grantees, and the publication according to law, and shall remain in force for twenty (20) years thereafter.

Passed March 21st, 1905.

Approved March 21st, 1905.

[SEAL.] B. M. BARNETT, *Mayor.*

Attest:

D. E. JONES, *City Clerk.*

(First published April 5, 1905.)

This ordinance was duly accepted in the manner provided.

Affidavit of C. H. Waring.

The defendant further introduced in evidence the affidavit of C. H. Waring, Superintendent, with a map attached, showing that the plants in Kansas City and Rosedale, Kansas, were two sepa-
67 rate, distinct, segregated utilities, having no connection or relation, except identity of ownership, as follows:

C. H. Waring, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting Superintendent of the Wyandotte County Gas Company; that he has been in the employ

of the defendant for a period of over Six (6) years; that his duties consist of superintending the distributing main systems of the defendant situated, located and operated in Kansas City, Kansas, and Rosedale, Kansas; that he is familiar with and knows the construction, location and character of the said plants, distributing systems or units of the defendant, the Wyandotte County Gas Company, and that he makes this affidavit with full, actual and personal knowledge of such facts.

Affiant further says that the map, sketch or draft hereto attached marked Exhibit "A" is a true and correct representation of the trunk mains of the distributing system in Kansas City, Kansas, the trunk mains of the distributing system in Rosedale, Kansas, the transportation system in Wyandotte County of the Kansas Natural Gas Company, the corporate limits of Rosedale, Kansas, and the corporate limits of Kansas City, Kansas.

Affiant further says that the heavy brown line indicated on said map commencing at a point on the south line of Wyandotte County about 3,000 feet west of the Kansas-Missouri State Line, thence northerly along Hudson Road, and other streets through Rosedale, Kansas, thence northerly across that portion of Wyandotte County lying and being between the corporate limits of Rosedale, Kansas, and Kansas City, Kansas, into the corporate limits of Kansas City, Kansas, thence northeasterly along Prichard Road across the southeast corner of Kansas City, Kansas, into the State of Missouri, is a portion of the transportation system of the Kansas Natural Gas Company, from which the defendant, the Wyandotte County Gas Company, purchases and acquires its natural gas for supplying its distributing systems in the City of Kansas City, Kansas, and in the City of Rosedale, Kansas.

That the three large brown circular dots located on the south Wyandotte County Line, on the south bank of the Kansas
68 river in Kansas City, Kansas, and east of the Kansas and Missouri State Line in the State of Missouri are reducing stations of the Kansas Natural Gas Company.

That the smaller red circular dots along said brown line in Rosedale, Kansas, are reducing stations of the Wyandotte County Gas Company used in connection with its distributing system located, situated and operated within the City of Rosedale and for the benefit of the people thereof.

That the corporate limits of the City of Rosedale are correctly represented on said map by double red lines.

That the corporate limits of the City of Kansas City, Kansas, are correctly represented by a single red line.

That the trunk or high pressure mains of the gas plant, distributing system or utility used by this defendant for furnishing, distributing and supplying gas to the City of Kansas City, Kansas, and its inhabitants are indicated by the orange colored lines on the said map; that extending from said orange — high pressure mains there are ramifying the streets, avenues and boulevards, within the corporate limits of the City of Kansas City, Kansas, numerous and various other distributing mains and services not indicated upon said map,

but affiant states the fact to be that all of said distributing mains, pipes and services are connected with and a part of said unit, plant, distributing system or utility indicated by said orange colored high pressure mains, and that none of said mains were high pressure or distributing mains or pipes extending beyond the corporate limits of the City of Kansas City, Kansas, or serving any patrons or consumers outside of the corporate limits of the City of Kansas City, Kansas.

Affiant further says that all of the gas sold and delivered by the Wyandotte County Gas Company in the corporate limits of the City of Kansas City, Kansas, is received from the transportation system of the Kansas Natural Gas Company within the corporate limits of said City of Kansas City, Kansas, in the Graystone Heights reducing station of said Kansas Natural Gas Company on the south bank of the Kansas river indicated by a large brown circular dot on said plat; and that said reducing station is in no way or manner connected with, related to or governed by the reducing sta-
69 tions of the Wyandotte County Gas Company used in the City of Rosedale.

Affiant further says that the heavy red lines and dots thereon indicated on said map within the corporate limits of the City of Rosedale, constitute and represent the high pressure distributing mains owned by the Wyandotte County Gas Company and used as a plant, distributing system or utility for the purpose of supplying the City of Rosedale and its inhabitants with natural gas; that appurtenant to said high pressure mains there are ramifying the streets, avenues and boulevards of said City of Rosedale numerous other low pressure distributing mains and services constituting a part of said unit distributing system, plant or utility; that none of said high pressure mains, or low pressure distributing mains or services extend beyond the corporate limits of the City of Rosedale, or supply any consumer outside of the corporate limits of said city.

Affiant further says that the said utility plant or distributing system indicated by said orange colored lines and the mains appurtenant thereto is situated and operated within the corporate limits of the City of Kansas City, Kansas, and operated wholly for the benefit of such city and its people.

Affiant further says that the said utility, plant or distributing system indicated by said heavy red lines on said map and the mains and services appurtenant thereto is situated and operated wholly within the corporate limits of the City of Rosedale, Kansas, and operated wholly for the benefit of such city and its people.

Affiant further says that all of its said properties, distributing mains, plants, systems or utilities considered as a whole in the State of Kansas are situated and operated wholly or principally within the corporate limits of the City of Kansas City, Kansas, and principally operated for the benefit of such city and its people; that more than ninety-seven per cent of its entire plant, properties, distributing systems or utilities in the State of Kansas is situated and operated wholly within the corporate limits of the City of Kansas City, Kansas, and principally operated for the benefit of such city and its people.

Affiant further says that the Wyandotte County Gas Company has no consumers and owns no property in Wyandotte County, Kansas, or elsewhere outside the corporate limits of the City of Kan-
70 sas City, Kansas, and Rosedale, Kansas, except six (6) small service pipes serving eleven (11) consumers, residents of Wyandotte County, Kansas, supplied with natural gas from the said transportation line of the Kansas Natural Gas Company, and that said services are in no way connected with the distributing units, plants, systems or utilities in the City of Kansas City, Kansas, or Rosedale, Kansas.

Affiant further says that as superintendent of said separate plants and distributing systems in said two cities this affiant knows and states the fact to be that the Wyandotte County Gas Company has no control or supervision over the quantity or pressure of gas transported through said transportation system indicated by said brown line on said plat; that said transportation line is the main flow line for natural gas from Southern Kansas and Oklahoma through the State of Kansas and into the State of Missouri; that the reducing stations on said transportation line indicated by said large brown dots are under the exclusive control of the said Kansas Natural Gas Company, and are no part of the aforesaid distributing systems, plants or utilities, either of the City of Rosedale or the City of Kansas City, Kansas.

And further affiant saith not.

(Here follows map marked page 71.)

MAPS

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72 *Affidavit of M. J. Barry.*

The defendant also introduced in evidence the affidavit of M. J. Barry, Assistant Secretary, showing the separate character of the business in Rosedale and Kansas City, Kansas.

M. J. Barry, being first duly sworn, deposes and says: That he is the Assistant Secretary of the Wyandotte County Gas Company, and as such is familiar with and knows the manner of conducting the business and keeping the books and accounts and offices of said company; that the principal office and place of business of said company is located at the corner of Sixth street and Minnesota avenue in the City of Kansas City, Kansas; that the plant, distributing system or utility situated and operated in the City of Kansas City, Kansas, for the benefit of said city and its people is a distinct, separate and segregated utility from that of Rosedale; that all the consumers of gas in the City of Kansas City, Kansas, pay their bills within the corporate limits of said City, and a consumer's ledger is kept for the consumers in the City of Kansas City, Kansas, separate and apart from those of the City of Rosedale, Kansas, and that all the accounts, moneys and sales of gas in the City of Kansas City, Kansas, are kept separate and distinct from those of the City of Rosedale and said plant and distributing system is by this affiant and the bookkeeper and accountants in his office understood, considered and kept as a separate utility from that of the City of Rosedale;

Affiant further says that the Wyandotte County Gas Company maintains a separate and distinct office in the City of Rosedale, Kansas, where all consumers of gas in said City pay their bills, file their applications and transact their business with the Wyandotte County Gas Company, and that a separate consumers' ledger, cash account and sales account is kept for all consumers of gas in the City of Rosedale, and that this affiant and his office force consider the plant, distributing system and utility maintained and operated in the City of Rosedale a separate, distinct and segregated system from that maintained and operated in the City of Kansas City, Kansas.

And further affiant saith not.

73 *Journal Entry on Temporary Injunction.*

And now on this 27th day of January, 1912, this cause came on for hearing upon the application of the plaintiff for a temporary injunction, the plaintiff appearing by John Marshall, attorney for the Public Utilities Commission of the State of Kansas, and R. J. Higgins, the defendant appearing by J. W. Dana, its attorney, and the Court after examining the pleadings and hearing the evidence and argument of counsel thereon doth take said case under advisement for one week.

Whereupon, the defendant moved the Court for an order requiring the plaintiff to give an undertaking executed by one or more sufficient sureties to be approved by the Court or the Clerk thereof in such

amount as may be fixed by the Court to secure the defendant against damages it may sustain if it be finally decided that the restraining order issued and now effective in said cause ought not to have been granted, which motion the Court overruled, to which ruling the defendant duly excepted and now excepts.

Whereupon, the defendant moved the court for a stay of the effect of the restraining order issued, and now operative herein upon the defendant giving an undertaking executed by one or more sufficient sureties to be approved by the Court in such amount as may be fixed by the Court on such conditions as the Court may fix, to the effect that the defendant will pay to the plaintiff all costs, loss or damage it may sustain and will refund to all consumers of gas the Two Cents per thousand cubic feet, the collection of which is restrained herein, and to secure to the plaintiff and all persons interested in or affected by this suit all damages it or they may sustain if it be finally decided that said restraining order is properly granted, which motion the court overruled, to which ruling the defendant duly excepted and now excepts.

Thereupon, the hearing in said cause was adjourned to February 3d, 1912.

And now on this 3d day of February, 1912, this cause came on for decision upon said application for a temporary injunction, and the Court sustained said application.

It is ordered, adjudged and decreed that the defendant,
74 its officers, agents and employees, be and the same are hereby temporarily enjoined from increasing the price for said natural gas to the consumers thereof in the City of Kansas City, Kansas, and Rosedale, Kansas, and Wyandotte County, Kansas, from Twenty-five Cents to Twenty-seven Cents per thousand cubic feet, or collecting a greater price than was collected on January 1st, 1911, to-wit: Twenty-five Cents per thousand cubic feet, to which order the defendant then and there duly excepted and now excepts.

Thereupon, the defendant moved the Court to require the plaintiff to give an underaking executed by one or more sufficient sureties before said temporary injunction should become operative to be approved by the Court or the clerk thereof in an amount to be fixed the Court to secure to the defendant the damages it may sustain if it be finally decided that this temporary injunction ought not to have been granted, which motion the Court overruled, to which ruling the defendant duly excepted and now excepts.

Thereupon, the defendant announced its intention to perfect an immediate appeal of said cause to the Supreme Court and moved the Court for an order to stay the effect of said order granting said temporary injunction upon the defendant giving to the plaintiff and all persons interested in said suit, and undertaking with one or more sufficient sureties, to be approved by the Court or the clerk, conditioned that if the order granting said temporary injunction be affirmed in whole or in part the defendant will pay to the plaintiff and to all consumers of gas or others interested in this suit all damages that it or they may sustain by reason of such proceedings.

and all costs in the Supreme Court, and that the defendant will collect and hold or deposit in Court and account for the Two Cents per thousand cubic feet, the collection of which is restrained by this temporary injunction, and will repay and refund to all consumers of gas said Two cents on such terms and under such regulations as may be approved by the court if it shall be finally determined that this temporary injunction is properly granted, which motion the court overruled, to which ruling the defendant duly excepted and excepts.

E. L. FISCHER, *Judge*.

75 On April 30th, the parties filed a stipulation submitting said cause on the evidence offered on the former hearing, reading as follows:

Stipulation.

It is hereby stipulated and agreed, by and between the parties hereto by their counsel duly authorized that the above entitled cause may be submitted to the court for final hearing, judgment and decree upon the evidence heretofore introduced on the hearing of the application for a temporary injunction in said cause, said evidence being subject to objection only upon the grounds of competency and relevancy.

JOHN MARSHALL,
Attorney for Plaintiff.
J. W. DANA,
Attorney for Defendant.

Final Decree.

And now on this 3rd day of May, 1912, this cause came regularly on for trial upon its merits upon the issues joined herein, plaintiff appearing by John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, and R. J. Higgins, and the defendant appearing by J. W. Dana, its attorney; whereupon, the parties hereto file a stipulation submitting said cause to the court for final judgment and decree upon the evidence heretofore introduced on the hearing of the application for temporary injunction in said cause, said evidence being subject to objection only upon the grounds of its competency, and the court being fully advised in the premises doth here now find the issues joined herein in favor of the plaintiff and against the defendant. Wherefore:

It is ordered, adjudged and Decreed, That the defendant, the Wyandotte County Gas Company, and its officers, agents, and employees, be and the same are hereby perpetually enjoined from increasing the price for said natural gas to the consumers thereof in the City of Kansas City, Kansas, and Rosedale, Kansas, and Wyandotte County, Kansas, from twenty-five cents to twenty-seven cents per thousand cubic feet and from collecting a greater price
76 than was collected on January 1st, 1911, to wit, twenty-five cents per thousand cubic feet, to which judgment and decision the defendant then and there duly excepted and now excepts.

It is further ordered, adjudged and decreed that the defendant pay the costs of this suit here now taxed at $14.95, to which ruling, order and judgment the defendant duly excepted and now excepts.

E. L. FISHER, *Judge.*

Motion for New Trial.

On May 4th, a motion for new trial was filed and heard on the ground of irregularities in the proceedings of the court and prevailing party, abuse of discretion, by which the defendant was prevented from having a fair trial; the decision is not sustained by sufficient evidence, and is contrary to the law; and error of law occurring at the trial and excepted to at the time by the defendant. Which motion was by the court overruled.

Assignment of Errors.

The trial court erred in the following orders, rulings and decisions, to-wit:

1. In overruling the demurrer to the petition.
2. In granting the temporary injunction.
3. In refusing to require the plaintiff to give bond on granting the temporary injunction.
4. In overruling the defendant's motion to stay said temporary injunction on terms fixed by the court.
5. In rendering final judgment against the defendant and granting the permanent injunction enjoining the defendant from collecting the contract price for natural gas.
6. In overruling the motion for new trial.

77 *Notice of Appeal.*

The notice of appeal was duly filed May 7th, 1912, being in form as follows:

Notice of Appeal of the Defendant the Wyandotte County Gas Company.

To the Plaintiff, the State of Kansas on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, and its Attorneys of Record:

You will take notice that the defendant, the Wyandotte County Gas Company, hereby appeals to the Supreme Court from the following orders, decisions, judgments and decrees of the District Court of Wyandotte County, Kansas, First Division, Honorable E. L. Fischer, Judge, to-wit:

1. The order overruling the defendant's demurrer to the plaintiff's petition rendered on the 27th day of January, 1912.
2. The order granting a temporary injunction rendered on the 27th day of January, 1912.

3. The order overruling the defendant's motion and application to require the plaintiff to give bond to secure the defendant against loss and damage by reason of the issuance of said temporary injunction, said order involving the merits and subject-matter of the controversy, rendered January 27th, 1912.

4. The order overruling the defendant's motion to dissolve the restraining order and temporary injunction and permit the defendant to collect the sums in controversy in the above entitled cause upon giving bond approved by the court, and hold or deposit the same subject to the order of the court, rendered January 27th, 1912.

5. The order, judgment and decree granting a permanent injunction against the defendant in the above entitled cause rendered on May 3d, 1912.

6. The order overruling the defendant's motion for a new trial rendered May 4th, 1912. Govern yourselves accordingly.

J. W. DANA,
Attorney for Defendant.

78 Personal service of a copy of the foregoing notice of appeal is hereby acknowledged this 8th day of May, 1912.

JOHN MARSHALL,
For Plaintiff.

Proof of Service of Notice of Appeal.

STATE OF KANSAS,
County of Wyandotte, ss:

J. W. Dana, being first duly sworn, deposes and says: That he is the attorney for the above named defendant; that one R. J. Higgins, attorney at law, residing in Wyandotte County, Kansas, appeared as attorney of record in the above entitled cause; that personal service of the notice of appeal can not at this time be had upon said R. J. Higgins, within the State of Kansas, for the reason that he is at this time sojourning in the East; that this affiant did on the 8th day of May, 1912, deposit in the mail at Kansas City, Kansas, a true and correct copy of said notice enclosed in a return envelope properly addressed to the said R. J. Higgins at his place of residence, to-wit, 606 North Sixteenth street, in Kansas City, Kansas, postage prepaid.

Affiant further says that on the 8th day of May, 1912, he delivered a true and correct copy of said notice of appeal to Honorable John Marshall, attorney of record in the above entitled cause.

And further affiant saith not.

J. W. DANA.

Subscribed and sworn to before me this 8th day of May, 1912.

MAUDE HAYS,
Notary Public.

My commission expires February 23d, 1914.

Certificate.

STATE OF KANSAS,
County of Wyandotte, ss:

I, R. J. McFarland, the duly elected, qualified and acting Clerk of the District Court of Wyandotte County, Kansas, do
79 hereby certify that the above and foregoing is a full, true and correct copy and transcript of the following named notice of appeal, proof of service and orders of court in the above entitled case, to-wit:

1. The notice of appeal of the defendant, the Wyandotte County Gas Company, filed in this office on the 7th day of May, 1912.

2. The proof of service of said notice of appeal filed in this office on the 8th day of May, 1912.

3. The order of court overruling the defendant's demurrer to the plaintiff's petition, rendered on the 27th day of January, 1912.

4. The order of court granting a temporary injunction against the defendant, rendered January 27th, 1912.

5. The order, judgment and decree of court granting a perpetual injunction rendered May 3, 1912.

6. The order of court overruling the defendant's motion for new trial, rendered May 4, 1912.

As the same, to-wit, said notice, proof of service and orders, judgments and decrees, appear of record and on file in the office of the Clerk of the District Court of Wyandotte County, Kansas.

In Testimony Whereof, I have hereunto subscribed my official signature and affixed the seal of my office this 9th day of May, 1912.

R. J. McFARLAND,
Clerk of the District Court.
By C. S. THOMAS, *Deputy.*

Certificate to Abstract.

STATE OF KANSAS,
County of Wyandotte, ss:

The undersigned, attorney and counselor for the appellant, does hereby certify that the above and foregoing is a true and correct abstract of the record in a certain civil action prosecuted to final judgment in the District Court of Wyandotte County, Kansas, First Division, before the Hon. E. L. Fischer, Judge, wherein the State of Kansas on the relation of John Marshall, Attorney for the Public Utilities Commission, is plaintiff and appellee, and The Wyandotte County Gas Company is defendant and appellant, the same being case No. 24876 of said trial court; and that the attorneys of record therein are John Marshall and R. J. Higgins for the plaintiff
80 and appellee and J. W. Dana for the defendant below, appellant here.

J. W. DANA.

81 Be it further remembered, that on the same day to-wit the 7th day of June, A. D. 1912, the same being one of the regular judicial days of the January Term, 1912 of the supreme court of the state of Kansas, before said court in session at the supreme court room in the city of Topeka, the following proceeding among others was had and remains of record in the words and figures as follows, to-wit:

82 In the Supreme Court of the State of Kansas, Friday, June 7, 1912.

No. 18221.

STATE OF KANSAS ex Rel., Appellee.
v.
THE WYANDOTTE COUNTY GAS COMPANY, etc., Appellant.

Journal Entry of Submission.

This cause comes on to be heard on the notice of appeal, transcript of the judgment and abstract of the record of the First Division of the District Court of Wyandotte County. And thereupon, after oral argument by J. W. Dana for the appellant, and by John Marshall and R. J. Higgins for the appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

83 Be it further remembered, that afterwards, on the 9th day of November, A. D. 1912, the same being one of the regular judicial days of the July 1912 Term of the supreme court of the state of Kansas, before said court in session at the supreme court room in the city of Topeka, the following proceeding among others was had and entered of record in the words and figures, as follows, to-wit:

84 In the Supreme Court of the State of Kansas, Sat., Nov. 9, 1912.

No. 18221.

THE STATE OF KANSAS ex Rel. JOHN MARSHALL, Att'y for Public Utilities Commission of the State of Kansas, Appellee.
v.
THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Appellant.

Journal Entry of Judgment.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be modified in this respect, to-wit: No valid contract existing between the appellant and the City of Kansas City, the rate for gas therein may be in-

creased by the appellant to whatever sum per thousand feet shall receive the consent and approval of the Public Utilities Commission. The contract existing between the appellant and the City of Rosedale being authorized by law the limitations therein provided must govern any advance in that city. With this modification, the judgment of the court below is affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $—, and hereof let execution issue.

85 Be it further remembered, that on the same day to-wit, the 9th day of November, A. D. 1913, there was filed in the office of the clerk of the supreme court of the state of Kansas, the court's syllabus and opinion in the above cause, which syllabus and opinion are in the words and figures, as follows, to-wit:

86 No. 18221.

THE STATE OF KANSAS on the Relation of JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas, Appellee,

v.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Appellant.

Appeal from Wyandotte County, District Court, Division No. 1. Modified.

Syllabus by the Court.

SMITH, *J.*:

1. The term "public utility" wherever used in the public utilities act (Chapter 238, Laws of 1911) means, "every corporation, company, individual, association of persons, their trustees, lessees or receivers" that may own, control or manage, except for private use, any equipment, plant, generating machinery or any part thereof in the operation of the business enterprises specified in section 3 of that act; and the term, as used in said act, nowhere means the physical equipment, plant or machinery used in conducting any such business.

2. The Public Utilities Commission for the State of Kansas has full power, authority and jurisdiction to supervise and control all public utilities described in section 3 of the Act, with the exceptions therein specified, and a public utility which owns or operates a separate equipment, plant or machinery for any of the specified purposes in two or more cities is not within such exceptions.

3. The power to contract for rates for the furnishing of water, light, heat or power to a city or its inhabitants is a sovereign, governmental power which is vested in the law-making power of the
87 state. The power may be delegated to the mayor and council of a city but is not to be inferred from mere convenience, but must be specifically granted or be absolutely essential to the exercise of other powers expressly conferred upon such mayor and council.

88 The opinion of the court was delivered by

SMITH, *J.*:

This action was brought January 4, 1912, in the name of the state of Kansas on the relation of the attorney for the Public Utilities Commission for the State of Kansas to enjoin the appellant gas company from increasing the rate charged for gas in Kansas City and Rosedale from twenty-five cents per thousand cubic feet to twenty-seven cents per thousand cubic feet without any order from the Public Utilities Commission authorizing such advance.

Section 30, Chapter 238 of the Laws of 1911, reads:

"Unless the commission shall otherwise order, it shall be unlawful for any common carrier or public utility governed by the provisions of this act within this state to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same services on the 1st day of January, 1911."

In defense the appellant alleged that under ordinances duly passed by the mayor and council of the respective cities in 1904 and 1905, it was authorized to advance the rate as alleged; that appellant accepted such ordinances which thereby became contracts inviolate; that appellant did charge the rate of twenty-five cents per thousand for gas in the respective cities from the time of the enactment of such ordinances until November 19, 1911, from and after which date it advanced the rate to twenty-seven cents as, by the terms of the respective ordinances, it was entitled to do. Trial was had in the district court, injunction was allowed and the gas company appeals.

Two principal questions are involved in the decision of the case; first, has the Public Utilities Commission any jurisdiction to regulate and control the rates for gas in the respective cities.

This question involves the meaning of the words "public utility" as used in the Public Utilities Act, especially as used in section 3, and more particularly in the closing sentence of that section. Section 3 reads:

89 "The term 'public utility,' as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant, generating machinery, or any part thereof, for the transmission of telephone messages or for the transmission of telegraph messages in or through any part of the state, or the conveyance of oil and gas through pipe lines in or through any part of the state, except pipe lines less than 15 miles in length and not operated in connection with or for the general commercial supply of gas or oil, or for the operation of any trolley lines, street, electrical or motor railway doing business in any county in the state; also all dining car companies doing business within the state, and all companies for the production, transmission, delivery or furnishing of heat, light, water or power; provided that this act shall not refer to or include mutual telephone companies. That mutual telephone companies, for the purposes of this act, shall be understood to mean any co-operative telephone company operating only for the

mutual benefit of its subscribers without profit other than the service received. Nothing in this act shall apply to any public utility in this state owned and operated by any municipality. The power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, shall be vested exclusively in such city, subject only to the right to apply for relief to said Public Utilities Commission as hereinafter provided in section 33 of this act."

It is contended by the state that the term "public utility" wherever used in the act means just what the legislature, in section 3, has defined it to mean, viz: "every corporation, company, individual, association of persons, their trustees, lessees or receivers," etc.

On the other hand, the appellant contends that the term is used in the last two sentences in section 3 in a different meaning,
90 viz: the pipes and other physical properties by means of which the public is served, and that as these physical properties are separately and independently situated and operated in the two cities, that there is a separate and distinct public utility in each city which each city, respectively, has authority to control and regulate, and over which the Public Utilities Commission has no jurisdiction. It is urged that the meaning of "public utility," defined in section 3, could not be applied to the next to the last sentence in the section, which provides, in substance, that the act shall not apply to any public utility owned and operated by any municipality. It is said that a municipality could not own and operate a "corporation, company, individual, association of persons," etc. Again, it is said that the qualifying words, "situated and operated wholly or principally within any city," etc., by common usage relate to physical objects and not to corporations, companies, etc.

As applied in these two sentences, the defined meaning of the term cannot be said to have been fortunate; or rather the two sentences cannot be said to have been fortunately constructed with reference to such meaning. A reading of the entire act, in which the term "public utility" is frequently used, shows the intent of the legislature to use the term with the meaning defined even in the two sentences referred to. For instance, in the first sentence of section 33 it is provided, in substance, every municipal council or commission shall have the power and authority to contract with any public utility, situated and operated wholly or principally within any city, etc. The qualifying words are the same as used in the last sentence of section 3, yet it would be absurd to suppose that authority was intended to be granted to a municipal council or commission to contract with pipes or other physical properties employed in operating the business.

The appellant further contends that the jurisdiction of the Public Utilities Commission is confined to inter-county or state-wide utilities; that the public utilities act is intended as a home-rule
91 provision; that it was intended, as shown by section 33, to give municipal councils or commissions power to contract with any public utility to the exclusion of the power of the Public Utilities Commission therein. This last contention is true, in a

measure, but, as we have seen, it is limited to a public utility "situated and operated wholly or principally within any city (which means one city) or principally operated for the benefit of such city or its people," and the appellant does not come within that description. Moreover, the appellant is not claiming under any contract made under the statute of 1911 but under an alleged contract made under Chapter 122, Laws of 1903. This statute contained no provision authorizing cities to contract with a public utility, but did authorize the governing power of cities of the first class, in which is Kansas City, to "prescribe and fix maximum rates and regulate the collection of the same, for all water, electric light, heat power, gas," etc.

Chapter 136, Laws of 1903, relates to cities of the second and third classes. Rosedale was in 1903, and still is, a city of the second class. Section 2 of this act authorized Rosedale "to contract and fix rates for private consumers, for a period not exceeding twenty years * * * (for) furnishing water, heat, light or power for public use." As authorized by this statute the mayor and council of Rosedale did by agreement with appellant, it is said, pass an ordinance, No. 295, substantially like the ordinance, No. 605, passed by the mayor and council of Kansas City, but with the further provision that no higher rates should at any time be charged in Rosedale than in Kansas City, Kansas. This provision is a limitation upon the specified prices named in the ordinance. It follows, therefore, that if the appellant could not legally advance the rate in Kansas City from twenty-five cents to twenty-seven cents, it could not advance the rate in Rosedale.

We may, then, disregard the greater power to contract given by the legislature to Rosedale and determine the case solely upon the grant of power to Kansas City, Kansas.

92 Where the provisions of an act are plain and unambiguous we can only determine the meaning of it by its terms. Otherwise, we might compare it with contemporaneous legislation. The appellant correctly says that it was not conveying gas through a pipeline but it was engaged in the business of furnishing and delivering gas to Kansas City and Rosedale and the inhabitants thereof. Heat and light, technically speaking, are not physical objects susceptible of transmission, delivery or furnishing, but are generated from combustible material or electricity. Indeed, the gas company furnishing Topeka operates under the name of Consumers Heat, Light & Power Company.

As said by the appellant, the utilities act was evidently framed upon similar acts in New York and Wisconsin. In chapter 409, Laws of 1907, of Wisconsin, the term "public utility" is defined to mean "every corporation * * * that now owns or hereafter may own, operate, manage or control any plant or equipment * * * for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly to or for the public."

The language in this respect is the same as in the Kansas act and each fairly includes the transmission, delivery or furnishing of gas for light and heat.

We conclude that the meaning of the term "public utility," wherever used in the act, is just what the legislature defined it to be and that the seeming incongruities in the sentences referred to result from the too abbreviated expression of terms used therein. Also that it is the intent of the act to give the power and authority to control and regulate a public utility to a city only as to such public utilities as operate and do business within, or principally within, the city to which the control is given and not elsewhere. That where, as in this case, the corporation constituting the public utility operates and conducts its business separately in Kansas City and Rosedale, the full power to control the same is vested in the Public Utilities Commission of the state as provided in section 1, of the public utilities act, which reads:

93 "The Board of Railroad Commissioners of the state of Kansas is hereby constituted and created a Public Utilities Commission for the state of Kansas, and such commission is given full power, authority and jurisdiction to supervise and control the public utilities and all common carriers, as hereinafter defined, doing business in the State of Kansas, and empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."

The remaining question is whether the ordinance of Kansas City, No. 6051, became, upon the acceptance thereof by the appellant, a contract binding upon the city, as it purports to be, for a period of twenty years after the passage and publication thereof.

In the case of In re Pryor, 55 Kan. 724, 41 Pac. 958, at page 728, it is said:

"In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this is a sovereign power, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms or by necessary implication."

In the City of Leavenworth v. Rankin, 2 Kan. 352 (Dass. Ed.), it is said:

"Municipal corporations are creations of law and can exercise only powers conferred by law and take none by implication. In making contracts they must act within the limits and observe the regulations prescribed, else there will be no contract. No subsequent act of the corporation can cure the defect where they do not. Persons contracting with such corporations must inquire into their power at their peril. (Leavenworth v. Laing, 6 Kan. 287.)"

Section 51, Chapter 122, Laws of 1903, upon which reliance is placed as granting authority to the city to contract with appellant, does not authorize the city to contract but does authorize the city "* * * to prescribe and fix maximum rates and charges and regulate the collection of the same. * * * The rates and charges so prescribed shall at all times be reasonable and just; and if
94 any city shall fix unreasonable and unjust rates and charges, the same may at the instance of any producer or consumer, be reviewed and determined by the district court of the county in which the city is located."

In section 170, of the same act, is the following:

"The mayor and council of any such city shall at all times during the existence of any such grant, contract or privilege, have the right by ordinance to fix a reasonable schedule of maximum rates to be charged for public and private purposes, including street-lighting, etc., for gas * * * or heat."

If section 51 should be construed as granting to the city the power to fix, once for all, the rates during the existence of the grant, this provision—that the city should at all times have such power—would be meaningless. It can be fairly construed only to mean that the city may at different times change the rate to meet changing conditions.

Section 170*a* of the act provides for granting a franchise to construct, maintain and operate a natural gas plant for the purpose of furnishing the city and its inhabitants natural gas for light, fuel and all other purposes, with authority to lay or maintain all necessary mains and pipes in the streets, avenues, alleys and public grounds of said city on such terms and conditions as may be agreed to by the mayor and council and such person, company or corporation.

In accordance with the rules of construction laid down in Freeport Water Co. v. City of Freeport, 180 U. S. 587, and other authorities cited, infra, the clause "that such franchise shall not continue for a longer period than twenty years," qualifies the clause, "to lay and maintain all necessary mains," etc., and not the clause, "on such terms and conditions as may be agreed to by said mayor and council and such person, company or corporation." If it were intended to convey the right to fix by agreement or contract with the public utility the rates to be charged for the service, such intent cannot be found in the language employed.

If the provisions of section 170*a* are ambiguous and it is a matter of doubt whether the construction above given of the terms thereof is correct, or whether, as contended by appellant,
95 the city was thereby authorized to contract and fix the rates for service on such terms and conditions as may be agreed to, the doubt must be resolved in favor of the public and not in favor of the appellant.

Freeport Water Co. v. City of Freeport, supra.

In Rogers Park Water Company v. Fergus, 180 U. S. 624, it is said:

"A governmental function in a statute granting powers to a municipal corporation cannot be held to have been granted away by statutory provisions which are doubtful or ambiguous."

See also,

Owensboro v. Owen-boro Waterworks Co., 191 U. S. 358;
Stanislaus Co. v. San Joaquin C. & L. Co., 192 U. S. 201;
Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385.

We conclude that by the provisions of Chapter 122, Laws of 1903, the mayor and council of Kansas City were not authorized to contract with the appellant the rates for supplying gas to the city or its inhabitants for a period of twenty years or for any term; that

without such authority no such contract is valid; that though chapter 136, Laws of 1903, did authorize the mayor and council of Rosedale to make such contract and they did make such contract, the contract was limited by the provision in the ordinance that no higher rate should be charged in Rosedale than in Kansas City; that the appellant had no right to raise the rate from twenty-five cents to twenty-seven cents on November 19, 1911, without the consent of the Public Utilities Commission.

The judgment in this case purports to be a perpetual injunction prohibiting appellant from raising the rate in either city from the rate collected January 1, 1911. It is conceded by appellee that the rate may be raised if consent or permission therefor be given by the Public Utilities Commission of the State of Kansas. As we have seen, no valid contract exists between appellant and Kansas City, and hence the rate for gas therein may be increased by appellant to whatever sum per thousand feet shall receive the con-

96 sent and approval of the Public Utilities Commission.

In Rosedale, however, a contract authorized by law exists and such contract, with the limitations therein provided, must govern any advance in that city.

It is therefore ordered that the judgment be modified as indicated herein and as so modified it is affirmed.

97 And afterwards, on the 29th day of November, 1912, there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition for a rehearing of this cause, which petition is in the words and figures, as follows, to-wit:

98 Filed Nov. 29, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18221.

THE STATE OF KANSAS on the Relation of JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas, Appellee,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Appellant.

Petition for Rehearing.

J. W. Dana, Attorney.

98 In the Supreme Court of the State of Kansas.

No. 18221.

THE STATE OF KANSAS on the Relation of JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas, Appellee,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, a Corporation, Appellant.

Petition for Rehearing.

And now comes the above named appellant, The Wyandotte County Gas Company, and moves the court for a reconsideration and re-hearing of the above entitled cause, for the reason that manifest error has been committed in the following particulars, to-wit:

1. In holding that no valid contract exists between appellant and Kansas City for the furnishing of natural gas to said city and its inhabitants under Ordinance 6051 of said city and its acceptance.

2. In holding that the public utilities act, Chapter 238, Laws of 1911, does not impair said contract under Sec. 10, Art. 1, of the Constitution of the United States.

3. In holding that said public utilities act does not take appellant's property in said contract, franchises and the gas plant constructed thereunder without due process of law under the
100 5th and 14th amendments of said Federal Constitution.

4. In holding Sec. 51, Chapter 122, Laws of 1903, relating to manufactured-gas plants and authorizing the mayor and council to prescribe and fix maximum rates and charges and to regulate the collection of the same, as applicable to or a limitation upon the authority and power to grant franchises and contract for natural gas.

5. In holding Section 170, Chapter 122, Laws of 1903, relating to manufactured gas franchise grants and providing that, "the mayor and council of any such city shall at all times during the existence of such grant, contract or privilege have the power by ordinance to fix a reasonable schedule of maximum rates," as applicable to, authority for or a limitation upon the power of the mayor and council to grant a franchise and contract for natural gas under Section 170*a* of the same act, providing that, "Nothing" in the entire "act" shall be construed as prohibiting the city from granting a franchise to construct, maintain and operate a "natural gas plant" and to lay and maintain all necessary mains and pipes in the streets for the purposes of furnishing to said city and its inhabitants "natural gas" "on such terms and conditions as may be agreed to" by the mayor and council and the grantee, provided only that such "franchise" shall not continue for a longer period than twenty years.

6. In construing said public utilities act so as to render the same

unconstitutional as taking appellant's property without due process of law.

7. In construing the public utilities act so as to render the same unconstitutional as denying to appellant the equal protection of the laws.

8. In holding that the 27-cent rate for natural gas duly fixed by ordinance in 1904 was not "fixed" as the "lowest schedule
101 of rates for such service on the 1st day of January, 1911," as required under Section 30 of said public utilities act.

The far-reaching consequences which must necessarily result from the principles upon which this case is decided and the conflict between those principles and the principles which have been heretofore recognized to be well settled rules of law by the decisions of this state and the United States Supreme court impel us to urge upon this court a careful, painstaking re-examination and re-hearing of this case.

The ultimate question in this case is the validity of the contract between appellant and Kansas City evidenced by Ordinance 6051 of said city and its acceptance. The validity of said contract depends upon the constitutionality of the act relating to public utilities, Chapter 238, Laws 1911, under the property guarantee clauses of the Federal Constitution, Section 10, Article 1, and the 5th and 14th amendments. The constitutionality of said act depends upon the proper construction of the act relating to cities of the first class, Chapter 122, Laws 1903, by authority of which the city contracted with appellant for natural gas.

Thus the property and contractual rights of the parties and the limits of the jurisdiction of the Public Utilities Commission depend alike upon the proper construction of said act relating to cities of the first class. The entire case, therefore, hinges on statutory construction, and it is conceded that the rule of strict construction laid down in the syllabus is the rule applicable to this case.

The contracting parties are entitled to have their contract construed and their rights measured agreeably to the statutes in force and the principles established by the decisions of this state at the time of entering upon said contract.

At the time of entering upon this contract both parties, under advice of counsel and with full knowledge of the rule of
102 strict construction, and presumably familiar with the application of that rule and the principles and precedents established by the decisions of this and other states and the United States, construed the statute as authorizing the mayor and council of Kansas City to grant on agreed terms and conditions a franchise to construct, maintain and operate a natural gas plant and to lay and maintain mains and pipes in the streets for the purpose of furnishing to said city and its inhabitants natural gas, and that nothing in the entire act prescribing limitations, restrictions and conditions upon the authority of the mayor and council with regard to manufactured gas, street railway, water and electric light franchises should be construed as prohibiting the mayor and council from granting said natural gas franchise on whatever terms and conditions

could be reached by agreement between the contracting parties with the one sole limitation upon such power that such natural gas franchise should not continue for a longer period than twenty years.

Presumably, the parties contemplating contracting and expending their money knew that way back in 1860 the first Supreme Court of Kansas held that:

"A ferry franchise is a contract between the legislature and the grantee and his assignee which the legislature can neither change, repeal nor impair the obligation of." The Territory v. Rayburn, 1 K. 552.

They knew that the same court in 1863 said:

"The will of the legislature expressed in the statute is the law and is to be ascertained by all legitimate methods of interpretation." Jones v. State, ex rel., 1 K. 273.

And that:

"It is only when all other methods of ascertaining the legislative intention fail that a court may look to the effects of a law; then their interpretation becomes a sort of judicial legislation." Dudley v. Reynolds, 1 K. 285.

The parties also knew that:

"Municipal corporations are creations of law and can ex-
103 ercise only powers conferred by law and take none by implication, and in making contracts they must act within the limits and observe the regulations prescribed, else there will be no contract." Leavenworth v. Rankin, 2 K. 357.

But they also knew that this principle was applied in a case where the mayor of Leavenworth sought by contract to bind the city at large for the cost of a special improvement which the statute expressly provided must be borne by abutting property, and in no event could become a charge upon the city. And they were also mindful of the fact that the proceedings relating to this same identical improvement when completed under said ultra vires and prohibited contract was cured by the Legislature, that the contractor got his money, and the assessments therefor were sustained in Hines v. The City of Leavenworth, 3 K. 186, thus showing the early policy of this state to be the enforcement rather than the repudiation of contracts made by its municipalities in good faith.

And the parties were also told that:

"There is a difference between executed and executory contracts. A city will generally be relieved from performing an illegal or void executory contract before any part of the same has been executed; while on the other hand a city will in many cases be compelled to perform such a contract, if it has already been executed by the other party and if in equity and good conscience, the city ought to perform it." Leavenworth v. Laing et al., 6 K. 287.

They saw that in 1884 Justice Brewer held that Section 2 of the bill of rights of the Kansas Constitution reserving all political power in the people and prohibiting irrevocable special privileges and immunities,

"Does not inhibit the Legislature from granting to municipal cor-

porations the power to permit railway companies to construct
104 and operate street railways therein." Atchison Street Ry. Co. v. Mo. Pacif. Ry. Co., 31 K. 661.

And that in that case Justice Brewer said:

"Had the Legislature given to the City of Atchison this power? It is conceded that no special grant of power in this direction had ever been made; but the contention is, that the general control of the streets vested in the corporation was sufficient to validate its action in granting permission to plaintiff to occupy the streets with its railway. This position we think must be sustained." P. 667.

And under authority to condemn land for waterworks and "to provide the city with water." Sec. 817, G. S. 1889; Sec. 60, Ch. 100, L. 1872. An irrevocable contract was authorized and the power to supply water carries with it the authority "as an incidental power" to "permit others to use the streets for that purpose." Wood v. Waterworks Co., 33 K. 597.

And it must be presumed that the contracting parties noticed that in 1886 Chief Justice Johnson, delivering the opinion of the court in City of Wyandotte v. Corrigan, 35 K. 24, said that:

"The defendant urges that the granting of the franchise and its acceptance by the company constituted a contract within the protection of the Federal Constitution, which could not be impaired by any subsequent legislation of the city without the assent of the company; and he contends that no other or different conditions or burdens could be imposed than those mentioned in the ordinances, and, therefore, that the license tax could not be enforced against the company or any of its agents. It may be conceded that the grant and its acceptance constitute a contract, the obligation of which comes within the protection invoked."

They observed that in 1887 an ordinance providing for lighting the streets of Winfield was held to be a contract binding in all of its parts, and that,

"Full force and effect must be given to the entire contract,
105 including the proviso." City of Winfield v. Gas Co., 37 K. 24.

And that the doctrine of bona fide purchasers of commercial paper was applied in Water Company v. Burlington, 43 K. 725, the court holding that after service was performed:

"The city can not after that time and as against an innocent purchaser repudiate its agreement and refuse to pay for the rent of the hydrants merely because of the original fraud and conspiracy entered into and consummated by the original party and the city officers."

And again, in Manly v. Emley, 46 K. 655, the prospective contracting parties saw the doctrine of vested rights enforced thus:

"In 1888 a city of the second class had the power to contract for water to be furnished to itself and its inhabitants. When a city of the second class becomes a city of the first class it retains all its vested rights with regard to its property and contracts, and remains responsible with regard to all its existing liabilities and obligations, whether under contract or otherwise."

In that case the court held that the levy of the water works "contract tax" was valid which was provided for in an ordinance of a city of the second class and was prohibited by statute as excessive when the city became one of the first class, thus clearly showing the parties to this contract at bar that the policy of this state and this court was to preserve inviolate contracts made by its municipalities, and it may here also be noted that the water contract in question was made under a statute giving cities of the second class only general powers to provide for a water supply. It requires great inferences and implications to construe such power to include prohibiting the Legislature from placing a limitation upon the purely sovereign power of taxation. Under this decision the parties were certainly entitled to construe the statute in the case at bar authorizing an agreement on terms to include at least fair and reasonable rates.

106 The parties to this contract also were informed that in 1892 this court held that:

"When a city * * * has entered into a contract, and a water works plant has been erected and maintained at a great expense for a period of four years or more, and during that period the corporation owning the plant has furnished water in accordance with a contract entered into and recognized by the city, and the city has levied the proper tax and paid the hydrant rental for three years, and otherwise recognized the validity of such contract, held that this court will not hold the contract void, * * * because the city did not possess the power to make a contract for the period of twenty-one years. While the city may be powerless to make a contract for the duration alleged, still the contract should be upheld for a reasonable time, when the circumstances and conditions of the city as to population and assessed valuations are substantially the same, and no better facilities are offered upon more reasonable terms." Water Works Co. v. Columbus, 58 K. 99.

And that in the opinion the court said:

"Again, if we are to follow our former precedent much argument of counsel for the city is lost wherein he contends that the franchise claimed is in direct conflict with Section 2 of the bill of rights. This court has said, speaking through Mr. Justice Brewer, that the words, 'No special privileges or immunities,' refer to privileges or immunities of a political nature."

"It is conceded that the plaintiff has only been furnishing water to the City of Columbus for a period of a little more than four years, the works having been tested and accepted on the 28th day of December, 1887. So far as the plaintiff can make it the contract is an executed one; and during the period of its existence while the city used the hydrants and paid a rental it became an executed contract, so far as the city was concerned. Now, the city having by its contract and permission invited the expenditure of a large
107 sum of money by the plaintiff in erecting the works in order to give the city such fire protection as it had agreed to pay for in the manner indicated in the ordinance, should not the water company be given a reasonable time in which it might have the

benefits of a contract which had been agreed to and recognized? Or, shall we say that, because there was no express authority to make the contract for the period of twenty-one years, it is, therefore, void? To hold to the latter proposition, when the parties can not be placed in the same condition they were in before the contract was executed, would be a violation of the plainest rules of good faith."

Then, after reviewing all the cases, this court said:

"Mr. Justice Valentine, in the case of Brown v. City of Atchison, 39 K. 54, speaking for this court after a review of the authorities upon the question of corporate power, deduced the following principles: 'Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of want of power on the part of the corporation to make it or to enter into it, but the contract is not immoral, inequitable or unjust, and the contract is performed in whole or in part by and on the part of one of the parties and the other party receives benefits by reason of such performance over and above any equivalent rendered in return and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party by either rescinding the contract and placing the other party in statu quo or by accounting to the other party for all benefits received for which no equivalent has been rendered in return, and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit."

Now, the contracting parties were certainly greatly misled by this most equitable and fair statement of the law when they
108 construed the authority to agree on terms to include the authority to agree on price.

Again, in Winfield v. Water Co., 51 K. 70, a water franchise fixing water rates was held to be a valid binding contract which could not even be rescinded for gross breach in supplying the proper quality of water until fair notice and opportunity had been given the water company.

But the parties to this contract were lulled into still greater assurance of their right to contract by the construction placed upon Section 30, Chapter 19, G. S., 1889, reading as follows:

"SEC. 30. The council may provide for and regulate the lighting of the streets and the erection of lamp posts and the numbering of the buildings in the city and the construction of sewers; and the council shall have power to make contracts with any person, company or association for such purposes; and give such person, company or association the privilege of furnishing light for the streets, lanes and alleys of said city for any length of time not exceeding twenty-one years."

In construing that section this court said:

"It is contended that the statute should be strictly construed, and that, when so construed, it does not confer power on the city authorities to provide for lighting the streets by erecting an electric light plant at its own expense, but that it is limited to accomplish-

ing the object by making a contract with some person, company or association to furnish lights. The statute should receive a fair and reasonable interpretation with a view to carry out its object. It should neither be destroyed by an unreasonable strictness, nor stretched to include that which was not in the legislative mind. * * * The word 'provided' is sufficiently comprehensive in its ordinary signification to include a provision by purchase."

"There would be room to doubt the power of the city authorities to enter into a continuing contract for lighting the streets for a long term of years with an individual or a corporation if the
109 statute did not contain express authority to do so, and in making such contract the mayor and council would necessarily bind their successors in office by their action and compel levys of taxes through successors to carry out the terms of the contract. The section under consideration does not confine the mayor and council to any one particular mode of lighting the streets, nor of providing light. They are restricted, however, if the contract be let to an individual or company to a term not longer than twenty-one years. It may be as much shorter as the parties agree on. We think if the statute were open to a double construction it should rather be given that one most favorable to the rights of the city and its inhabitants." State, ex rel., v. Hiawatha, 53 K. 478.

Here is a statute where the court might have said the phrase, "Not exceeding twenty-one years," should modify the word "privilege," and not the word "contracts" in the preceding part of the paragraph relating to sewers and building numbers, but the court very naturally held that the statute should not be destroyed by construction, but should be given its natural meaning, and the court very aptly says that the statute is not open to a double construction. Now, were not the parties to this contract at bar entitled to rely upon the construction placed upon this almost identical statute by this court when they entered upon this contract in good faith and expended their millions to furnish natural gas to Kansas City and its inhabitants under a statute which authorized them to "agree on terms"?

Again, in Watkins v. Glenn, 55 K. 417, this court, speaking through Justice Horton, said that:

"Any subsequent law of the state which so affects the remedy as substantially to impair and lessen the value of the contract is forbidden by Article 1, Section 10, of the Constitution of the United States, which ordains that no state shall pass any law impairing the obligation of contracts."

110 Here is a positive declaration that there is no constitutional reservation in Kansas of power to impair municipal contracts by legislation, and that even an alteration of the remedy may be an impairment.

Again, the parties were greatly misguided by the holding that where,

"A city granted a franchise and entered into a contract with a party to construct, reconstruct, maintain, repair and operate an electric light plant for furnishing light to the city for a period of eight years at a stipulated rate, the city to make monthly payments

for the light furnished, the right to rescind the contract for non-performance was not reserved to the city in the contract itself. The plant was built and operated for a long time under the contract, and then, without fault of the owner, it was partly destroyed by fire. The owner determined to re-build the plant, and without unjustifiable delay proceeded to do so. And the city, although well aware of this fact, gave no notice of a purpose to terminate the contract until the plant was practically re-built. Held, that under the circumstances the city could not terminate the contract in that way nor by the mere repeal of the ordinance granting the franchise." Mills v. City of Ossawatomie, 59 K. 463.

An examination of the statute will show that this irrevocable contract was made under a statute which merely authorized the city to provide for an electric light plant to furnish light to the city and its inhabitants.

Again, the parties to this contract were greatly misled by the reassuring language of the court in a quo warranto suit prosecuted by the state questioning the power of a corporation furnishing water in Topeka to alienate its franchises to operate said plant and take and collect the tolls and rates fixed by the ordinance. This court in that case as late as 1900 said, after reviewing the authorities:

"The ordinances accepted by the water company were in
111 the nature of contracts and were property within the meaning of the law.

"In the making of said contracts evidenced by ordinances the city was not exercising legislative or governmental powers, but quasi private power conferred by law and in such matters it could exercise its business affairs governed by the same rules as applied to an individual or a private corporation." State v. Water Co., 61 K. 561.

In the syllabus the court said:

"Corporations can not sell or mortgage their franchises received from the state which conferred power upon them to exist as artificial bodies; but those franchises denominated as secondary, which include the privileges granted by a city to a water company with the right to take tolls, etc., may under our statute be lawfully alienated or incumbered."

And the parties observed that in 1872 the Legislature provided that:

"The council may provide for and regulate the lighting of the streets and the erection of lamp posts, and the council shall have power to make contracts with and authorize any person, company or association to erect gas works in said city, and give such person, company or association the exclusive privilege of furnishing gas to light the streets, lanes and alleys of said city, for any length of time not exceeding twenty-one years." Sec. 59, Ch. 100, Laws 1872.

And that in this section the power to "regulate" seemed to be reserved and the twenty-one years' limitation clue seemed to modify the verb "to give" the "exclusive privilege," and that it does not modify the power to contract, and that no express power to contract

or agree on terms for and definite period of time is granted. Yet in Baxter Springs v. Light Co., 64 K. 591, this court held that:

"An ordinance of a city, duly passed and published conferring certain privileges and imposing certain duties upon an electric light company which, under the charter of the city it had the power
112 to confer (section above quoted), the terms of which ordinance were accepted by the company as herein provided, constitute a contract between the city and such company, binding upon both."

In the opinion they also observed that:

"A contract good enough to obtain benefits under is good enough to warrant a recovery of payment for such benefits. * * * This rule of ordinary morals applies as strongly to a municipality as to an individual."

And they naturally concluded that it would surely apply to the infallible sovereign state as well.

But, if the contracting parties ever had any doubt about the power of Kansas City to make this contract, or saw any ambiguity, or imagined any concealed or latent infirmity in said statute, or if, as a matter of fact, the power was "balanced in doubt," their doubt vanished when they saw the construction and interpretation placed upon the decisions of the Supreme Court of Kansas as to such municipal contracts, laid down by the United States Circuit Court of Appeals in 1896 in Bank v. Arkansas City, 76 Fed. 271, in which the court said:

"May a municipality obtain and accept the use of expensive water works under a contract by which it covenants to pay annual rentals therefor and to grant an exclusive privilege to use its streets for that purpose and escape the performance of all its covenants because it was beyond its power to make the privilege which it granted exclusive? This is the first question in this case. Paragraph 7185, G. S. 1889, which was in force when the contract here in question was made, provided:

"'That cities of the first, second and third class of the State of Kansas are hereby granted full power and authority on behalf of such cities respectively to contract for and procure water works to be constructed for the purpose of supplying the inhabitants of such cities with water for domestic use, the extinguishment of fires and for manufacturing, and for other purposes.'"

113 "It is settled by repeated decisions of the highest judicial tribunal of the State of Kansas that under this and other sections of the statutes of that state a city of the second class has authority to grant a franchise to a person or a corporation to establish water works to furnish the city and its inhabitants with water, to grant the privilege of using its streets to a private corporation for such a purpose, and to agree to pay a rental to it for the use of its hydrants. Gen. St. Kan. 1889, Pars. 878, 817, 1401, 1402, 7185-7190; Wood v. Waterworks Co., 33 Kan. 590, 7 Pac. 233; Burlington Waterworks Co. v. City of Burlington, 43 Kan. 725, 23 Pac. 1068; Columbus Waterworks Co. v. City of Columbus, 46 Kan. 666, 26 Pac. 1046; Manley v. Emlen, 46 Kan. 655, 27 Pac. 844; Colum-

bus Waterworks Co. v. City of Columbus, 48 Kan. 99, 101, 28 Pac. 1097, 1098. These decisions conclude this question here. When no question of general or commercial law, and no question of right under the constitution and laws of the nation, are involved, the Federal courts uniformly follow the construction of the constitution and laws of a state given by its highest judicial tribunal. This rule is adhered to with marked tenacity in the construction of state statutes, which measure the powers and liabilities of political and municipal organizations of a state. Maden v. County of Lancaster, 27 U. S. App. 528, 536, 12 C. C. A. 566, 570, and 65 Fed. 188, 192, and cases cited; Detroit v. Osborne, 135 U. S. 492, 499, 10 Sup. Ct. 1012, 1013."

Continuing the court said:

"But it is insisted that this contract is beyond the powers of the city and void, because it grants the right to use the streets of the city to the water company, and promises to pay rental for the hydrants, for twenty-one years. The proposition on which this contention rests is that the members of the city council are trustees for the public, that they exercise legislative powers, and that they can make no grant and conclude no contract which will bind the city
114 beyond the terms of their officers, because such action would circumscribe the legislative powers of their successors, and deprive them of the right to their unrestricted exercise as the exigencies of the times might demand. There are two reasons why this proposition cannot be successfully maintained in this case:

"First, it ignores the settled distinction between the governmental or public, and the proprietary, or business, powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. Dill. Mun. Corp. (3rd Ed.) Sec. 66, and cases cited in the note; Safety Insulated Wire & Cable Co. v. City of Baltimore, 13 C. C. A. 375, 377, 378, 66 Fed. 140, 143, 144; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453, 468, 469; Com. v. City of Philadelphia, 132 Pa. St. 288, 19 Atl. 136; New Orleans Gaslight Co. v. City of New Orleans, 42 La. Ann. 188, 192, 7 South. 559, 560; Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Washington State, 316, 325, 28 Pac. 516, 519; Wagner v. City of Rock Island, 146 Ill. 139, 154, 155, 34 N. E. 545,
115 548, 549; City of Vincennes v. Citizens Gaslight Co., 132 Ind. 114, 126, 31 N. E. 573, 577; City of Indianapolis v.

Indianapolis Gaslight & Coke Co., 66 Ind. 396, 403; Read v. Atlantic City, 49 N. J. Law, 558, 562, 9 Atl. 759. In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Cor. Sec. 27; City of Cincinnati v. Cameron, 33 Ohio St. 336, 367; Safety Insulated Wire & Cable Co. v. City of Baltimore, supra, and cases cited under it.

"Second. The powers granted to this city by the Legislature of the State of Kansas to contract for and procure waterworks are plenary, and unlimited save by the duty to exercise them with reasonable discretion, and it is not the province of a court to contract or clip the legislative grant. The words are, 'full power and authority to contract for and procure waterworks to be constructed for the purpose of supplying the inhabitants of such cities with water.' It cannot but be clear to all who are familiar with the condition of cities of the second class—cities whose population was between 2,000 and 15,000—in the State of Kansas, in 1872, when this grant was made, that it was not the intention of the Legislature of that state to limit the terms of these contracts to the single year during which the terms of office of the members of the city councils continued. The cities were young and poor, but they were ambitious and sanguine. They did not have the ready money to construct the waterworks which the health and comfort of their inhabitants required. It is hardly possible that any individual or corporation could have been induced to expend the thousands of dollars required to construct such works as have been built in this city in consideration of the right to use the streets of the city for that purpose, and of the promise of
116 rental for its hydrants for the limited term of a single year. These facts the members of the Legislature must have known, and they undoubtedly granted this plenary power to contract for the very purpose of enabling the cities to procure a supply of water for their inhabitants by grants of privileges to private parties to use their streets for that purpose for a reasonable term of years, and by covenants to pay rentals for hydrants for a like term. In any event, the Legislature made this grant, and it thereby vested in the mayor and council of the city the right to make such contracts for such terms as, in their discretion they thought proper. There is nothing in this record to show that the mayor and city council of Arkansas City either exceeded their authority or abused the discretion which the Legislature gave them when they fixed the term of the contract in this case at twenty-one years. Ample power was granted to cities of the second class of the State of Kansas by Section 7185, Gen. St. Kan. 1889, to grant the right of the use of their streets to lay water pipes and to pay hydrant rentals for reasonable terms longer than the year during which their mayors and councilmen held their offices, and there is nothing in this record to show that twenty-one years was a unreasonable time for the term of such contract." Wood v. Waterworks Co., 33 Kan. 590, 597, 7 Pac. 233, 238; Burlington Waterworks Co. v. City of Burlington, 43 Kan.

725, 728, 23 Pac. 1068, 1069; Manley v. Emlen, 46 Kan. 655, 27 Pac. 844; Columbus Waterworks Co. v. City of Columbus, 46 Kan. 665, 26 Pac. 1046; Columbus Waterworks Co. v. City of Columbus, 48 Kan. 99, 113, 28 Pac. 1097, 1102; Atlantic City Waterworks Co. v. Atlantic City, 48 N. J. Law, 378, 6 Atl. 24; Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586, 591; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913; Walla Walla Water Co. v. City of Walla Walla, 60 Fed. 957, 960; City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396, 407; City of Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 124, 125, 31 N. E. 573."

117 "If, upon general principles, there was any doubt that the defenses of ultra vires, which have been considered, could not be maintained in this suit, the repeated decisions of the highest judicial tribunal of the State of Kansas upon these questions would compel that conclusion."

Here the Federal court reviews all the Kansas decisions and concludes:

"The result is that the City of Arkansas City made an irrevocable contract with the Interstate Gas Company, the terms of which are evidenced by Ordinance No. 27, and that none of the provisions of that contract which are in question in this suit are invalid on the ground that the city exceeded its powers in making the contract."

And then holds that:

"The Ordinance No. 304, by which the city in terms repealed Ordinance No. 27, on which the contract for the waterworks was founded, was, of course, void as against the trustee and the bondholders, because it impaired the obligation of a contract."

With all the foregoing principles established by this long line of precedents and the repeated application of the rules of construction by our own Supreme Court and the construction and interpretation of these decisions by the Federal Court, and the unbroken chain of decisions of the United States Supreme Court cited in appellant's brief in the following cases:

Los Angeles v. Water Co., 20 Sup. Ct. 736.
Walla Walla v. Water Co., 19 Sup. Ct. 77.
Water Co. v. Rivers, 6 Sup. Ct. 373.
Vicksburg v. Water Co., 27 Sup. Ct. 766.
City Railway Co. v. Street Ry. Co., 17 Sup. Ct. 753.
Minneapolis v. St. Ry. Co., 30 Sup. Ct. 118.
Omaha Water Co. v. City of Omaha, 147 Fed. 1.

118 Detroit v. Citizens Street Ry. Co., 22 Sup. Ct. 110.
Vicksburg v. Water Co., 26 Sup. Ct. 660.
Vicksburg v. Water Co., 27 Sup. Ct. 762.
Telephone Co. v. Los Angeles, 29 Sup. Ct. 52.

The parties to this contract in all good faith and reliance upon said principles, precedents and rules of construction sought to know the meaning and to discern the authority of Kansas City conferred by Chapter 122, Laws of 1903.

In examining that chapter they found the title, "An act relating to cities of the first class," comprehensive enough under the consti-

tutional requirement to cover any power conferred. In Section 3 they found that, "Every city governed by the provisions of this act shall be a body corporate and politic," thus vesting in said city corporate or private business functions as well as public or governmental powers; and on referring to the decisions of this court they found that in making contracts for public utilities, "The city was not exercising legislative or governmental powers, but quasi private power conferred by law, and in such matters the council exercised its business affairs governed by the same rules as applied to an individual or private corporation." State v. Water Co., 61 K. 561; Baxter Springs v. Light Co., 64 K. 598; Bank v. Arkansas City, 76 Fed. 271. And that there is, "A settled distinction between the governmental or public and the proprietary or business powers of a municipality * * * and that a city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. Bank v. Arkansas City, 75 Fed. 282.

And in the same section, following this grant of corporate existence, the parties found that such city "Shall have power
119 to make all contracts, and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate and administrative powers." They reasoned in the light of the foregoing precedents that the city was here given power to contract so far as "necessary" in the exercise of either its business and governmental powers in getting this natural gas. They argued that the supply of natural gas was certainly one of the great "concerns" of Kansas City, at that time, and whether it was a corporate function or a governmental function there was certainly express power to contract therefor.

But, after running through the entire act, examining it section by section, and observing that there were many limitations and restrictions upon this broad grant of power to contract, with reference to certain named public utilities, to-wit, waterworks, street railways, electric lighting and manufactured gas, they found the most natural thing in the world in Section 170*a*, viz., that none of the restrictions, limitations and conditions upon the aforesaid power to contract with reference to these old and established public utilities should apply to a natural gas utility, for the very apparent reason that natural gas had just made its advent and the fondest hopes of the denizens of these cities was to acquire it for domestic use on any terms that might be agreed to. Wherefore, the Legislature provided in said Section 170*a* that (transposing the section to conform to the court's opinion and its setting with the preceding sections of the act):

"Nothing in this act" shall be construed as prohibiting any city governed and controlled by the provisions of this act from granting a franchise to construct, maintain and operate a natural gas plant and to lay and maintain all necessary mains and pipes in the

streets for the purpose of furnishing said city and its inhabitants natural gas on such terms and conditions as may be agreed to, and the mayor and council of any such city are hereby authorized
120 to grant such franchise to construct, maintain and operate said natural gas plant and to lay and maintain all necessary mains and pipes in the streets, provided that such franchise shall not continue for a longer period than twenty years.

In logical sequence the clause, "nothing in this act, etc.," modifies, limits and excepts from the provisions of the entire act all these conditions and limitations prescribed therein as to manufactured gas and other public utilities; and the present participle, "granting," and the infinitive participle, "to grant," are both modified and limited by the adverbial clause, "On agreed terms and conditions." There is no escaping the grammatical and logical construction of this language, and conceding the construction of the court herein, viz., that the past participial adverb, "provided," and the clause following it, modifies and limits the adverbial infinitives, "to construct, maintain and operate" and "to lay and maintain pipes," yet this very construction of the court leaves "the power to grant" modified and limited only by the adverbial phrase, "on terms and conditions agreed on."

The subject of the sentence is, "mayor and council," the predicate, "are authorized." Are authorized to what? "To grant." The infinitive "to grant" modifying the predicate "are authorized." To grant what? A franchise. The word "franchise" being the object of the infinitive "to grant." To grant how or in what manner? "On terms." What kind of terms? "Agreed terms." There is only one clause in the entire section which indicates the manner in which this authority "to grant" shall be exercised, and that clause is "on agreed terms and conditions," which is in fact and in legal effect by contract. There is no escaping this construction.

Certainly the city had some power under this section to contract, to agree to something, and under Section 3 it had express power to contract on all "concerns" of the city. Now, if the parties had authority to agree on terms and conditions, the sole question
121 confronting them was to what extent they could go in their agreement. There is no limitation prescribed in the statute. It is pertinent to note that they had power to agree, both as to terms and as to conditions on the grant. These two words were certainly not used by the legislature as synonymous; the conditions were to be imposed upon the right of the grantee to exercise the franchises granted, namely, to occupy the streets, to maintain a gas plant and to collect rates. These were the conditions which the city had a right to impose upon and require of the grantee, and the grantee was entitled upon the performance of those conditions to exact and receive the "terms" which the city was authorized to agree to. Now, what terms could the city agree to, except the matter of price?

Turning to Ordinance 6051 in the record, we find that it is divided into two parts, Sections 1 to 7, inclusive, constitute what is offered, given, agreed to and granted by the city, among which are

the rates to be charged. Section 8 consists of 14 separately numbered paragraphs, all of which are the "conditions" upon which the rights granted and agreed to in the first seven sections may be exercised. This Section 8 starts out by saying:

"The rights, privileges and franchises herein granted are for the following consideration and upon the following 'conditions,' to-wit:"

The first condition is that twenty-five miles of mains shall be supplying natural gas within one year and others laid from time to time by order of the mayor and council.

The second condition is that the grantee shall pay two per cent of its gross receipts into the city treasury and make certain reports.

The third condition is that the grantee shall construct and maintain a 750,000-foot capacity gas holder.

The fourth condition is that the grantee shall extend its
122 mains a hundred feet for each consumer.

The fifth condition is that the pipes and mains shall be laid under the supervision of the city engineer and so as to not obstruct public travel.

The sixth condition is that the grantee shall pay $100.00 bridge rental for each city bridge.

The seventh condition is that the grantee shall maintain $1,000.00 on deposit to guarantee repairs of the streets.

The eighth condition is that the grantee shall put up a $25,000.00 cash bond and a $100,000.00 surety bond to guarantee performance of said contract.

The ninth condition is that the grantee shall not sell its franchises, plant or property to a foreign corporation, but shall organize a domestic corporation to operate the same.

The tenth condition is that the grantee shall run service mains to the lot lines of all consumers and furnish meters free of charge.

The eleventh condition is that the franchise may be forfeited for breach or non-performance.

The twelfth condition is that the grantee shall file a written acceptance of the "terms, obligations and conditions."

The thirteenth condition is that free gas shall be furnished to city buildings and public libraries, etc.

The fourteenth condition is that if Kansas City, Missouri, shall obtain gas from the companies furnishing natural gas there at a lower rate than the rates fixed in the ordinance, the Kansas City, Missouri, rates shall control.

These are the "conditions" imposed by the city upon the Company which it was authorized to agree to, and which it would now reluctantly relinquish, and all of which the record shows have been fully performed by grantee and appellant.

Now, what were the "terms" which the city could "agree to?"

123 Section 1 embraces the franchise to occupy the public ways of the city which the city was authorized "to grant."

Section 2, the privilege to maintain and operate the gas plant.

Section 3 provides that "the grantee, its successors and assigns, shall be entitled to charge and collect from consumers of such gas

during the period of two years from and after natural gas is first furnished hereunder, at the rate of not to exceed twenty-five cents per thousand cubic feet, and during the period one year next thereafter at the rate of not to exceed twenty-eight cents per thousand cubic feet, and during the period of one year next thereafter at the rate of not to exceed twenty-nine cents per thousand cubic feet, and during the period of one year next thereafter at the rate of not to exceed thirty cents per thousand cubic feet, and thereafter during the period of the aforesaid grant, at the rate of not to exceed thirty-five cents per thousand cubic feet."

Now, suppose there was no authority contained in Section 170*a* to make this agreement, yet we find that by Section 3 of the same act the city "Shall have power * * * to make all contracts * * * in relation to the * * * concerns of the city necessary to the exercise of its corporation and administrative powers." Now, assuming that the city had only power to grant a franchise to occupy the streets and to operate a natural gas plant, yet was it not absolutely necessary to the exercise of this corporate or governmental function, as the case may be, to agree upon the price of this gas in order to obtain it at all? There is no escaping the conclusion that an agreement as to price was an absolute necessity in order to acquire this cheap and desired fuel. It required the expenditure of millions of money in new and additional distributing systems, pipe line facilities, pumping stations, leases and contracts for gas in order to supply Kansas City with this gas, and even if there was nothing in Section 170*a* authorizing the mayor and council
124 "to agree on terms," which terms should include the price of gas, the power conferred by Section 3 last above quoted to make contracts in relation to all concerns of the city was ample and sufficient to authorize the contract in question.

In the opinion the court cites Section 51, Chapter 122, Laws 1903, as the statute, "Upon which reliance is placed as granting authority to the city to contract with appellant." The court is certainly mistaken by inferring that this is the section on which appellant relies for authority for this section names specifically water, electric light, heat, power, gas, telephone service, or any other commodity, and there is no hint of authority to contract in this section, but merely the "power to enact ordinances for all the purposes named," but this power to enact ordinances and to repeal the same contained in this Section 51 is limited, restricted and modified by Section 170*a* providing that, "Nothing in the act shall be construed as prohibiting any city governed and controlled by the provisions of this act from granting * * * a franchise * * * for natural gas * * * on such terms and conditions as may be agreed to * * *."

Again, the court cites Section 170, where it is provided that "The mayor and council of any such city shall at all times during the existence of such grant, contract or privilege have the right by ordinance to fix a reasonable schedule of maximum rates." Now, what franchise is referred to by the word "such"? Certainly it is the franchise under discussion in Section 170 and Section 169, and on examining those sections we find that, "The municipal authori-

ties of any city, governed and controlled by the provisions of this act, may permit any person, company or corporation to manufacture, sell and furnish gas, light, electric light, power or heat to any city, etc." Certainly, the word "such" qualifies and limits the class of franchises concerning which the mayor and council shall reserve power to regulate rates to the class named, to-wit, the manufactured gas franchise, and all this becomes more plain, apparent, clear and unanswerable when we find in the next section, captioned "Period of Contract; How the City May Acquire Title; Natural Gas," that, "Nothing in this act," which includes this reservation (quoted by the court in this opinion) "shall be construed as prohibiting any city * * * from granting * * * a franchise * * * for natural gas * * * on such terms and conditions as may be agreed to."

In the opinion the court says that,

"If Section 51 shall be construed as granting to the city power to fix, once for all, the rates during the existence of the grant this provision—that the city shall at all times have such power—would be meaningless."

We respectfully submit that this section has its full and complete meaning by reference to the class of franchises named, to-wit, manufactured gas, electric light, and street railway franchises, and that to extend this class of franchises to include natural gas franchises renders the provision that, nothing in this act shall be construed as prohibiting the city from granting a franchise for natural gas on such terms and conditions as may be agreed to wholly nugatory and meaningless.

If the court's conclusion is correct that Section 51 is the authority for granting the franchise at bar, and that Section 170 is applicable to said franchise and reserves in the city the power to regulate rates under a natural gas grant, then it follows that Section 170a is an idle repetition of the same authority, for it is clear and not controverted that the mayor and council of such city are thereby authorized to grant a franchise to construct, maintain and operate a natural gas plant and to lay and maintain mains and pipes in the streets for the purpose of furnishing natural gas, which power the court holds was duly conferred in Section 51. This section must have an independent meaning of its own, a purpose to accomplish, and that meaning and purpose was to cover the
126 subject-matter of natural gas grants and to remove the numerous limitations and restrictions on other utility grants by authorizing an agreement on terms, the exigencies of the times and the demands of the cities of this state for natural gas prompted such action and justified such authority. If this is not the intent of the section and the act, then we must attribute to the Legislature the folly of chanting over to itself as in a trance the authority already conferred upon the city. This we can not do under the repeated decisions of this court.

The franchise given embraced but three rights, viz., to operate a plant, to use the streets and to collect rates; of these the first two were burdens or obligations taken, the last, "to collect rates," is the only

real right conferred. Certainly the Legislature could not object to appellant being bound for centuries to carry the burdens and do the work, the only item or right in this franchise which should be restricted was the right to collect a definite rate.

Again, a most pertinent inquiry reflecting upon the construction of this section, is the question, why the proviso, limiting a natural gas grant to *twenty* years when authority was delegated to grant to all other utilities in the state exactly the same franchises to construct plants and occupy the streets for a period of thirty years? To propound the question is to answer it. No authority was given to fix rates by contract with these other utilities. In Sections 51, 64, 169 and 170 of the act the bare naked authority to grant the use of the streets was given and the express power to regulate rates during such grants was reserved, while in Section 170*a*, relating to natural gas grants, the authority was delegated to bind the city and the state by an irrevocable contract guaranteed under the Federal Constitution, and the legislature very wisely and properly limited the term of such grant embodying such a contract to a much shorter period of time.

127 We again revert to the rule of strict construction to which we all subscribe, that all ambiguity must be resolved against the city's right to contract, and if its authority is "balanced in doubt," such doubt must be resolved in favor of the state, but "it is not the province of the court to contract or clip the legislative grant." Bank v. Arkansas City, 76 Fed. 282. And the "balanced doubt" should not arise in the mind of this court from the mere denial of such power by appellee nor from the judgment of the court below, but the rule adopted by Chief Justice White of the Supreme Court should apply, to-wit:

"The rule then to be applied when the matter is balanced in doubt is this and nothing more, that if in using its independent judgment as it is its duty to do a serious doubt arises in the mind of the court, then the interpretation by the state (lower court) acting upon a serious doubt created by the existence of independent judgment, will cause such judgment to preponderate in favor of the construction given by the state (lower court) to (the) its own statute." Water Co. v. Freeport, 21 Sup. Ct., 502.

In other words, the doubt must be a real genuine honest question, and not one arising from the mere assertion or denial of power.

This court cites the Freeport case as authority for the construction given the Kansas Statute. Chief Justice White delivered a most scathing dissenting opinion in that case in which three of his associates, Justices Brewer, Brown and Peckham, concurred. The Supreme Court, and no other court, except this, to our knowledge, has cited it as authority, except in construing the same identical Illinois statute in the Rogers Park Water Company case, in which the same justices again dissented. The Freeport case was again referred to and greatly limited, if not in fact reversed, by the Supreme Court, in Vicksburg Water Co., 27 Sup. Ct. 766, in which that court said:

128 "In the latter (Freeport) case this court following the construction of the Supreme Court of Illinois held that where a city council was authorized to contract with any person or corporation to construct and maintain waterworks at such rate as may be fixed by ordinance for a period not exceeding thirty years, the words 'fixed by ordinance' being capable of application so as to make one ordinance endure for the period of thirty years for which the contract was made, or to give the right to pass ordinances from time to time regulating rates, the latter construction was adopted."

In the case at bar no authority was given "to fix rates by ordinance," but the authority was given "to agree on terms." The distinction is apparent—one was authority to legislate, the other authority to contract—but aside from this construction condemned by every other court in the land and by four out of nine of the Supreme Justices, there were ample reasons for the holding in the Freeport case which are wholly wanting in this case. The parties to the contract in that case were bound at their peril to know the ruling in the Danville case and other decisions of the Supreme Court of Illinois, to the effect that under the incorporation act of that state the state itself reserved the power to regulate rates of public utilities, while in the case at bar, the unbroken chain of decisions of this court has been that there is no such reservation or constitutional limitation upon the power of the legislature to delegate authority to make an irrevocable contract, even the holding of the court in the syllabus of this case is that an irrevocable contract may be authorized. The contracting parties in the Illinois cases could not complain for, "the obligations of the charter of a water company are not unconstitutionally impaired by construing the charter in the light of the statute law and the decisions of the courts at the time the charter was granted." Consumers Co. v. Hatch, 32 Sup. Ct. 465.

129 The case of Louisville v. Cumberland Telephone & Telegraph Co., 32 Sup. Ct. 574, decided at the October Term, 1911, gives a clear view of the right rule of construction applicable to the case at bar. In that case, the legislature created a corporation and empowered it to construct, maintain and operate telephone and telegraph lines and to use the streets of cities with the consent of the city authorities.

The court said:

"In 1886, when the Ohio Valley Telephone Company was chartered, the legislature not only had the sole right to create corporations and to grant franchises, but, without municipal consent, it could have authorized the company to use any and all streets of the city of Louisville. Instead, however, of exercising this plenary power, the charter declared that the company might maintain its telephone system, erect poles and string wires over the streets and highways of the city, with and by the consent of the general council. These provisions of the charter gave the municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept; in which event the franchise granted by the state would have been nugatory. But when the assent was given, the con-

dition precedent had been performed, the franchise was perfected, and could not thereafter be abrogated by municipal action. For, while the city was given the authority to consent, the statute did not confer upon it the power to withdraw that consent, and no attempt was made to reserve such a right in the collateral contract contained in those provisions of the ordinance relating to the company's giving a bond and carrying the police and fire wires free of charge. If those or other terms of this independent and separate contract had been broken by the Ohio Valley Company or its successors, the city would have had its cause of action. But the municipality could not by ordinance impair that contract nor revoke the rights con-
130 ferred. Those charter franchises had become fully operative when the city's consent was given, and thereafter the Company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the State of Kentucky. Such franchises granted by the legislature could not, of course, be repealed, nullified or forfeited by any ordinance of a general council."

This case has come to our notice since the hearing of this cause, and we think the principles of construction announced there are conclusive upon the court in this case.

As in that case, the city could have imposed any terms it saw fit upon the appellant at the time of making this contract, "terms which the Company might have been unable or unwilling to accept," and in the case at bar as in that case the city was authorized to agree but not to withdraw that agreement, "while the city was given the authority to consent, the statute did not confer upon it the power to withdraw that consent, and no attempt was made to reserve such a right in the contract."

But, assuming that appellant is wrong in all of its conclusions, that the city was entirely mistaken of its authority, that Section 170*a* was a sounding brass and a tinkling cymbal repeating authority already conferred, and that all prior decisions of this state are to be ignored and all rules of construction laid down by the courts are to be abrogated, still the fact remains that on the first day of January, 1911, when Section 30 of the public utilities act took effect, the 27-cent rate was as a matter of fact actually "fixed on said 1st day of January, 1911," as the "lowest schedule" of rate for natural gas, and that the same should stand as so fixed until some order is made by the Public Utilities Commission changing the same.

The holding in this case is equivalent to a finding that appellant and its officers are guilty of manifold criminal offenses under
131 Section 30 of the public utilities act and subjects it to criminal prosecutions therefor, because it followed the apparently well established law of this state.

Therefore appellant in all good faith would earnestly urge upon the court's attention that the general injunction should not issue herein, but that the rates fixed on the 1st day of January, 1911, by said ordinance No. 6051 of Kansas City should remain in force and be observed until such time as the commission under its *board* powers

of investigation ascertain some other or different rate and enter an order putting the same into effect.

Wherefore, appellant prays that a re-examination and re-hearing of the above entitled cause may be granted by this honorable court, and its judgment herein be reversed or at least modified as set forth herein.

J. W. DANA, *Attorney.*

132 Be it further remembered, that afterwards on the 17th day of January, A. D. 1913, the same being one of the regular judicial days of the January Term, 1913, of the supreme court of the state of Kansas, before said court in session at its court room in the city of Topeka, the following proceeding among others, was had and entered of record in the words and figures as follows, to-wit:

133 In the Supreme Court of the State of Kansas, Friday, January 17, 1913.

No. 18221.

THE STATE OF KANSAS ex Rel., etc., Appellee,
v.
THE WYANDOTTE CO. GAS CO., etc., Appellant.

Journal Entry Denying Petition for Rehearing.

Now comes on for decision the petition for a rehearing of this cause; thereupon it is ordered said petition for a rehearing be denied.

134 *Authentication of Record.*

STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, clerk of the supreme court of the state of Kansas, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the case of The State of Kansas, ex rel. John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, vs. The Wyandotte County Gas Company, a corporation, and also a true, full and complete transcript of the syllabus and opinion of the said court rendered herein as the same now appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka Kansas this 25th day of February A. D. 1913.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

135 Here follows, the original petition for a writ of error and assignments of error, the original writ of error and the allowance thereof, a copy of the Stay and supersedeas Bond, the original citation and waiver of service:

136 Filed Feb. 4, 1913. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18221.

THE STATE OF KANSAS on the Relation of JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas, Appellee,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, Appellant.

Petition for Writ of Error, Assignment of Errors and Prayer.

Considering itself aggrieved by the final decision of the Supreme Court of Kansas in affirming the final judgment and decree of the District Court of Wyandotte County, Kansas, and rendering final judgment against it in the above entitled case, the defendant hereby prays a writ of error from the said decision and judgment of the Supreme Court of Kansas to the Supreme Court of the United States and an order fixing the amount of a supersedeas bond.

And the said The Wyandotte County Gas Company assigns as error in the records and proceedings of said case, that the Supreme Court of Kansas erred in holding and deciding that the public utilities act, Chapt. 238 Laws of 1911, and particularly Sec. 30 thereof as applied in said case to this defendant is valid.

The validity of said act, statute and section was denied and drawn in question by the defendant on the ground of it being repugnant to the Constitution of the United States and in contravention thereof. Said question being raised and appearing in the records and proceedings, as follows:

137 1. The plaintiff sought to enjoin the defendant from collecting from gas consumers the rates fixed by contract evidenced by Ordinance 6951 of Kansas City, Kansas, authorized by Sec. 170*a*, Chapt. 122 Laws of 1903, for the reason that the collection of said rates so fixed by contract were prohibited by Sec. 30, Chapt. 238 Laws of 1911; the defendant answered as follows:

"For a further and seventh answer and defense to the plaintiff's petition, defendant alleges, that by reason of the premises, the said act relating to public utilities and the construction placed thereon by plaintiff and relator herein and the commencement and prosecution of this suit are each and all in conflict with and in violation of the following provisions of the constitution of the United States of America, to-wit:

(*a*) Sec. 10 of Art. 1: 'No state shall * * * pass any law impairing the obligations of contracts.'

(*b*) Art. 5 Amendments: 'No person shall * * * be deprived * * * of property without due process of law; nor shall private property be taken for public use without just compensation.'

(*c*) Art. 14 of Amendments: 'No state shall make or enforce any law which shall abridge the privileges *of* immunities of citizens of the United States; nor shall any state deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

2. It was assigned as error on appeal to the Supreme Court of Kansas, Assignment No. 5, being as follows:

"The trial court erred in the following orders, decisions and rulings, to-wit: * * *

5. In rendering final judgment against the defendant and granting the permanent injunction enjoining the defendant from collecting the contract price for natural gas."

3. It was the basic question presented on oral argument and briefs. See brief, pp. 51 to 113, inclusive.

4. The validity of said act was again drawn in question on the petition for re-hearing, as follows:

138 "And now comes the above named appellant, The Wyandotte County Gas Company, and moves the court for a reconsideration and re-hearing of the above entitled cause, for the reason that manifest error has been committed in the following particulars, to-wit:

1. In holding that no valid contract exists between appellant and Kansas City for the furnishing of natural gas to said city and its inhabitants under Ordinance 6051 of said city and its acceptance.

2. In holding that the public utilities act, Chapter 238, Laws of 1911, does not impair said contract under Sec. 10, Art. 1, of the Constitution of the United States.

3. In holding that said public utilities act does not take appellant's property in said contract, franchises and the gas plant constructed thereunder without due process of law under the 5th and 14th amendments of said Federal Constitution.

4. In holding Sec. 51, Chapter 122, Laws of 1903, relating to manufactured gas plants and authorizing the mayor and council to prescribe and fix maximum rates and charges and to regulate the collection of the same, as applicable to or a limitation upon the authority and power to grant franchises and contract for natural gas.

5. In holding Section 170, Chapter 122, Laws of 1903, relating to manufactured gas franchise grants and providing that, 'the mayor and council of any such city shall at all times during the existence of such grant, contract or privilege have the power by ordinance to fix a reasonable schedule of maximum rates,' as applicable to, authority for or a limitation upon the power of the mayor and council to grant a franchise and contract for natural gas under Section 170*a* of the same act, providing that 'Nothing' in the entire 'act' shall be construed as prohibiting the city from granting a franchise to construct, maintain and operate a 'natural gas plant' and to lay and maintain all necessary mains and pipes in the streets for the purposes of furnishing to said city and its inhabitants 'nat-

ural gas' 'on such terms and conditions as may be agreed to' by the mayor and council and the grantee, provided only that such 'franchise' shall not continue for a longer period than twenty years.

6. In construing said public utilities act so as to render the same unconstitutional as taking appellant's property without due process of law.

7. In construing the public utilities act so as to render the same unconstitutional as denying to appellant the equal protection of the laws.

8. In holding that the 27-cent rate for natural gas duly fixed by ordinance in 1904 was not "fixed" as the 'lowest schedule of rates for such service on the 1st day of January, 1911,' as required under Section 30 of said public utilities act.

139 The far-reaching consequences which must necessarily result from the principles upon which this case is decided and the conflict between those principles and the principles which have been heretofore recognized to be well settled rules of law by the decisions of this state and the United States Supreme court impel us to urge upon this court a careful, painstaking re-examination and re-hearing of this case.

The ultimate question in this case is the validity of the contract between appellant and Kansas City evidenced by Ordinance 6051 of said city and its acceptance. The validity of said contract depends upon the constitutionality of the act relating to public utilities, Chapter 238, Laws 1911, under the property guarantee clauses of the Federal Constitution, Section 10, Article 1, and the 5th and 14th amendments. The constitutionality of said act depends upon the proper construction of the act relating to cities of the first class, Chapter 122, Laws 1903, by authority of which the city contracted with appellant for natural gas.

Thus the property and contractual rights of the parties and the limits of the jurisdiction of the Public Utilities Commission depend alike upon the proper construction of said act relating to cities of the first class. The entire case, therefore, hinges on statutory construction, and it is conceded that the rule of strict construction laid down in the syllabus is the rule applicable to this case.

The contracting parties are entitled to have their contract construed and their rights measured agreeably to the statutes in force and the principles established by the decisions of this state at the time of entering upon said contract"

5. That the decision and judgment of the Supreme Court of Kansas as appears from the opinion in said case is as follows:

"We conclude that by the provisions of Chapt. 122 Laws of 1903 the mayor and council of Kansas City were not authorized to contract with the appellant (the Wyandotte County Gas Company) the rates for supplying gas to the city or its inhabitants for a period of twenty years or for any term; that without such authority no such contract is valid; * * * that the appellant had no right to raise the rates from twenty-five cents to twenty-seven cents on November 19, 1911 (which it was authorized to do under its franchise-contract) without the consent of the Public Utilities Commission."

6. The errors of the Supreme Court of Kansas appearing in the records and proceedings of said case are more particularly set forth and assigned as follows:

140 The Court erred in holding and deciding:

1. That Sec. 170*a*, Chapt. 122, Laws of 1903 did not authorize a valid and irrevocable contract for natural gas between The Wyandotte County Gas Company and the City of Kansas City, Kansas;

2. That the natural gas contract evidenced by Ordinance No. 6051 of Kansas City, Kansas and authorized by Sec. 170*a*, Chapt. 122 Laws of Kansas 1903, was not a valid contract; and that the obligations of said contract were not entitled to protection against impairment under the provisions of Art. 1, Sec. 10 of the Federal Constitution;

3. That the Public Utilities act, Chapt. 238 Laws of 1911, and Sec. 30 thereof, which prohibited the collection of the rates fixed in said contract as and when applied to this defendant did not impair the obligation of said contract contrary to the provisions of Art. 1, Sec. 10 of the Federal Constitution;

4. That said public utilities act, Chapt. 238, Laws of 1911, and Sec. 30 thereof, as and when applied to appellant does not take appellant's property in said contract-franchise and its gas plant constructed thereunder without due process of law contrary to the 5th and 14th amendments of the Federal Constitution.

For which errors the defendant, The Wyandotte County Gas Company, prays that the said judgment of the Supreme Court of the State of Kansas dated November 9th 1912 & rehearing denied January 17th, 1913, be reversed and a judgment rendered in favor of the defendant, and for costs.

J. W. DANA,

Solicitor for The Wyandotte County Gas Company.

141 STATE OF KANSAS,
County of Wyandotte, ss:

Let the writ of error issue upon the execution of a bond by The Wyandotte County Gas Company to the State of Kansas, in the sum of Fifty Thousand ($50,000.00) Dollars; such bond when approved to act as a supersedeas.

Dated Feb. 4th, 1913.

W. A. JOHNSTON,

Chief Justice of the Supreme Court of Kansas.

142 [Endorsed:] In the Supreme Court of the State of Kansas. No. 18221. The State of Kansas, ex rel., Appellee, vs. The Wyandotte County Gas Company, Appellant. Petition for Writ of Error, Assignment of Errors and Prayer. J. W. Dana, Solicitor for Appellant. Filed Feb. 4, 1913. D. A. Valentine, Clerk Supreme Court.

143 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Kansas, on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, and the Wyandotte County Gas Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or any authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or *or* a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said The Wyandotte County Gas Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that they under your seal, distinctly and openly, you send the record and proceed-

144 ings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 4th day of Feb, in the year of our Lord One thousand nine hundred and thirteen.

MORTON ALBAUGH,
Clerk of the United States District Court, District of Kansas.

Allowed:

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

145 [Endorsed:] In the Supreme Court of the State of Kansas. No. 18221. The State of Kansas, ex rel., Appellee, vs. The Wyandotte County Gas Gas Company, Appellant. Writ of Error. J. W. Dana, Solicitor for Appellant. Filed Feb. 5, 1913. D. A. Valentine, Clerk Supreme Court.

146 In the Supreme Court of the State of Kansas.

No. 18221.

THE STATE OF KANSAS on the Relation of JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas, Appellee,

vs.

THE WYANDOTTE COUNTY GAS COMPANY, Appellant.

Copy.

Bond.

Know all men by these presents, That The Wyandotte County Gas Company as Principal, and O. W. Shepherd and C. N. Prouty, as Sureties, are held and firmly bound unto the State of Kansas in the sum of Five Thousand ($5,000.00) Dollars, for the payment of which well and truly to be made, we do hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Whereas, A final decree and judgment was rendered in the District Court of Wyandotte County, Kansas, on the 3d day of May, 1912, enjoining the Wyandotte County Gas Company from collecting from consumers of natural gas in Kansas City, Rosedale and Wyandotte County, Kansas, any sum in excess of Twenty-five Cents per thousand cubic feet. And,

Whereas, said judgment and decree was affirmed by the Supreme Court of Kansas on the 17th day of January, 1913. And,

Whereas, The above named appellant, The Wyandotte County Gas Company, seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Supreme Court of the State of Kansas.

Now therefore, The condition of the obligation is such that if the above named Wyandotte County Gas Company shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged, and refund and repay the sum of Two Cents per thousand cubic feet to all consumers of natural gas in Kansas City, Rosedale and Wyandotte County, Kansas, who pay their bills
147 on or before the 10th day of the month following the month in which the gas is used at the rate of Twenty-seven Cents per thousand cubic feet, if it shall be finally adjudged and determined that The Wyandotte County Gas Company it not entitled to collect for said gas at the rate of Twenty-seven Cents per thousand cubic

feet, and if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

Signed, sealed and dated this 3rd day of Feb., 1913.

[SEAL.] THE WYANDOTTE COUNTY GAS COMPANY.
By E. L. BRUNDRETT, *President.*

Attest:

M. J. BARRY,
Secretary.

O. W. SHEPHERD.
C. N. PROUTY.
Securities.

STATE OF KANSAS,
County of Wyandotte, ss:

O. W. Shepherd for 50,000.00 and C. N. Prouty for 15,000.00, being first duly sworn on oath, deposes and say: We are each of lawful age and are citizens of the State of Kansas, and know the contents of the foregoing instrument to which we have subscribed our names. We each for himself say as above indicated we are worth the sum of Fifty Thousand Dollars over and above all debts, liabilities and exemptions.

O. W. SHEPHERD.
C. N. PROUTY.

Subscribed in my presence and sworn to before me this 3d day of Feb., 1913.

[SEAL.] MAUDE HAYS,
Notary Public.

My commission expires Feb. 23, 1914.

Bond approved, and to operate as a supersedeas.

W. V. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

Copy.

148 [Endorsed:] In the Supreme Court of the State of Kansas. No. 18221. The State of Kansas, ex rel., Appellee, vs. The Wyandotte County Gas Company, Appellant. Copy. Bond. J. W. Dana, Solicitor for Appellant. Filed Feb. 4, 1913. D. A. Valentine, Clerk Supreme Court.

149 *Citation.*

Filed Feb. 4, 1913. D. A. Valentine, Clerk Supreme Court.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Kansas and John Marshall, Attorney, and the Public Utilities Commission of Kansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Kansas, wherein The State of Kansas, on the relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, is plaintiff and appellee, and The Wyandotte County Gas Company is defendant and appellant, to show cause, if any there be, why the judgment rendered against the said appellant, The Wyandotte County Gas Company, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Kansas, this 4th day of February, 1913.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

TOPEKA, KANSAS, *Feb.* 4, 1913.

I, attorney of record for the State of Kansas, on the relation of John Marshall, attorney for the Public Utilities Commission of the State of Kansas, plaintiff below and appellant here in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

JOHN MARSHALL,
Attorney for the State of Kansas on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas.

150 [Endorsed:] In the Supreme Court of the State of Kansas. No. 18221. The State of Kansas, ex rel., Appellee, vs. The Wyandotte County Gas Company, Appellant. Citation. J. W. Dana, Solicitor for Appellant. Filed Feb. 4, 1913. D. A. Valentine, Clerk Supreme Court.

151 *Certificate of Lodgement.*

SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, clerk of the said court, do hereby certify that there was lodged with me as such clerk on February 4th, 1913, in the matter of the State of Kansas, on the relation of John Marshall, attorney for the Public Utilities Commission of the State of Kansas vs. The Wyandotte County Gas Company, a corporation:

1. The original Bond, of which a copy is set forth herein.

2. Two copies of the Writ of Error, as herein set forth, one for the defendant, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said court at my office in Topeka, Kansas, this 25th day of February, 1913.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

152 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

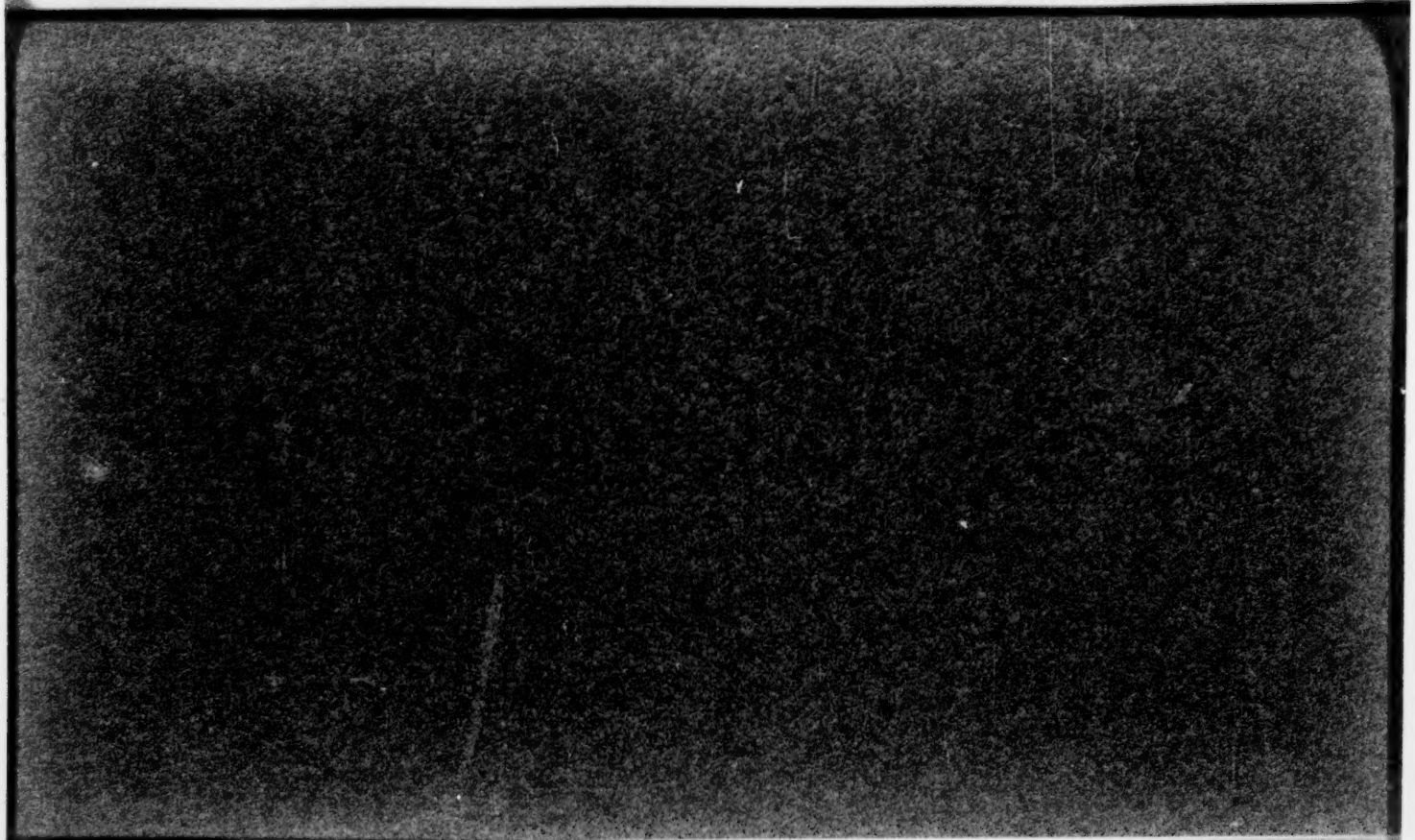
In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas, in the city of Topeka, Kansas, this 25th day of February, A. D. 1913.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 23,570. Kansas Supreme Court. Term No. 472. The Wyandotte County Gas Company, plaintiff in error, vs. The State of Kansas on the relation of John Marshall, attorney for the Public Utilities Commission of the State of Kansas. Filed March 1st, 1913. File No. 23,570.

[redacted]



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In the

Supreme Court of the United States

October Term, 1913.

No. 472.

THE WYANDOTTE COUNTY GAS COMPANY,
Plaintiff in Error,

vs.

THE STATE OF KANSAS, on the Relation of JOHN MARSHALL, Attorney for the Public Utilities Commission of the State of Kansas,
Defendant in Error.

STATEMENT.

This action was commenced and prosecuted to final judgment in the state courts of Kansas to enjoin the plaintiff in error from charging and collecting the franchise-contract rates for natural gas in Kansas City, Kansas, and Rosedale, Kansas, which said contracts fixed schedules of prices for twenty years from and after the 14th day of December, 1904, which schedules permitted an increase from

25 to 27 cents per thousand cubic feet on November 19, 1911; but an Act of the Legislature, effective May 22, 1911, prohibited such increase and fixed the rates of all public utilities at the rates in force and collected on January 1st, 1911, until the Public Utilities Commission orders a change; such order was never made nor obtained, but plaintiff in error, agreeably to and relying upon said franchise-contracts, proceeded to increase its rates for natural gas from 25 to 27 cents on or about said November 19, 1911; whereupon, on January 4, 1912, this suit to enjoin said raise in rates was commenced under said Act of 1911 prohibiting said increase. The Rosedale franchise-contract was held to be authorized by statute and therefore inviolable; the Kansas City, Kansas, contract was held to be unauthorized by statute and therefore not protected against impairment by said Act of 1911 under the contract clause of the Federal Constitution; this ruling and judgment plaintiff in error brings to this Court for review. The geographical jurisdiction of the Kansas Public Utilities Commission under the Act of 1911 was also involved in the case below, but that matter is not reviewable by this Court and is immaterial to the main question of contract-impairment here presented.

The facts in this case are uncontroverted. (Rec., Or. 41, pt. 24.)* The existence of said contract, its construction, and the right, measured by its terms, to charge and collect the 27-cent rate were not controverted below. The only question presented here for review is whether or not Ordinance No. 6051 of Kan-

*References are to the original marginal numbers first and then to the printed pages of the record.

sas City, Kansas, and its acceptance and the statutes of the State authorizing it and the decisions of the courts of said State constitute a contract which may not be impaired by said Act of 1911 which prohibits the collection of the rates agreed upon in said franchise-contract.

The trial was had in the District Court of Wyandotte County, Kansas, on the verified petition of the attorney for the Public Utilities Commission, the verified answer of the Company, and certain affidavits immaterial to this inquiry.

The plaintiff's petition states the personnel of the Commission (Or. 30, pt. 16); that John Marshall was its attorney; that on the 3d day of January, 1912, it ordered said attorney to begin and prosecute an action in said court against the defendant, to enjoin said defendant from advancing the price of natural gas to consumers thereof in Kansas City, Kansas; that the Company is a public utility, engaged in the business of supplying natural gas to said city and its inhabitants; that on January 1st, 1911 (Or. 31, pt. 16), it was charging domestic consumers in said city the sum of 25 cents per thousand cubic feet; that it had not applied to the Commission for permission to increase said price; that said Commission had not ordered any advance; that the defendant had wrongfully and unlawfully increased the price of natural gas to consumers in said city from 25 to 27 cents per thousand cubic feet; and was charging and collecting said price and would continue so to do unless restrained and enjoined by the court; and that the plaintiff, the State of Kansas, and said consumers were without remedy except in equity.

The plaintiff prayed for a permanent injunction restraining the collection of any price for natural gas to consumers in Kansas City greater than that charged and collected on January 1st, 1911, until ordered by the Public Utilities Commission as provided by said Act. (Or. 32, pt. 17.)

The verified answer (Or. 45, pt. 27) and affidavits of the defendant admitted that it was a public utility; that it was charging 25 cents per thousand cubic feet on January 1, 1911; that it had increased its price to 27 cents on or about November 19, 1911, and was charging and collecting said rate without the order or consent of the Public Utilities Commission; that said 27-cent rate was agreed upon, fixed and determined in 1904 by said contract evidenced by said Ordinance No. 6051 and its acceptance; and that its right so to do could not be impaired by said Act of 1911 under the contract clause of the Federal Constitution. (Or. 48 and 53, pt. 29, 32 and 33.)

Thereupon the trial court rendered judgment enjoining defendant from charging said contract rates and from increasing the price of natural gas to consumers thereof in Kansas City, Kas., and Rosedale, Kas., from 25 to 27 cents per thousand cubic feet, or from collecting any greater price than was collected on January 1, 1911, as provided by Sec. 30 of said public utilities act. (Or. 76, pt. 49.)

The Supreme Court of Kansas held that the statutes of the state authorized the Rosedale rate contract, but did not authorize the Kansas City, Kas., contract, evidenced by Ordinance No. 6051 and its acceptance (Or. 84, pt. 53 and 54); that the company was therefore not entitled to charge the schedule of rates fixed and agreed to therein, and could charge and collect no

greater rate than that collected January 1, 1911, without the consent, approval and order of the Public Utilities Commission, and as so modified, the judgment of the trial court was affirmed.

From which final judgment the plaintiff in error prosecutes this writ of error (Or. 143, pt. 86); *supersedeas* having been allowed by the Chief Justice of the State Supreme Court.

The only question involved here is whether or not Ordinance No. 6051 of said city (Or. 54, pt. 33) and its acceptance, under the statutes in force at the time and the decisions of the Supreme Court of said state, constitutes a contract which may not be impaired by the Act of the 1911 Legislature prohibiting the collection of the rates agreed to therein.

On and prior to December 14, 1904, the city of Kansas City, Kansas, and its inhabitants were supplied with manufactured gas under Ordinance No. 5637 of said city (Or. 56, pt. 35), which contained, either by direct recital or necessary inclusion, all the restrictions and limitations of the statutes of that state governing the acts of cities of the first class relative to granting franchises providing for furnishing manufactured gas to such cities and their inhabitants.

Some time prior to said date natural gas had been discovered and developed in southern Kansas, (Or. 56, pt. 35), and said city and its inhabitants became and were at said time very desirous of procuring a supply (Or. 54, pt. 33), of said natural gas for light, fuel and power purposes; the furnishing of said natural gas to Kansas City, Kansas, involved the transportation thereof from southern Kansas approximately the width of the state. (Or. 56, pt. 35.)

Thereupon and during the 1903 session of the Legislature the statutes of said state relating to cities of the first class were so amended as to remove and exclude from natural gas franchises all the limitations and restrictions imposed upon the powers of such city with reference to granting manufactured gas franchises (see Appendix), and said city was authorized to provide for a natural gas supply on such terms and conditions as might be agreed to, said amendment and delegation of authority being as follows:

Sec. 170a, Ch. 122, Laws of 1903, Sec. 906, G. S. 1905:

> "* * * Nothing in this Act shall be construed as prohibiting any city governed and controlled by the provisions of this Act from granting, and the mayor and council of any such city are hereby authorized to grant, to any person, company or corporation a franchise to construct, maintain and operate a *natural-gas plant* for the purposes of furnishing to said city and its inhabitants natural gas for light, fuel and all other purposes, with authority to lay and maintain all necessary mains and pipes in the streets, avenues, alleys and public grounds of said city, *on such terms and conditions as may be agreed to by said mayor and council and such person, company or corporation: Provided*, that such *franchise* shall not continue for a longer period than twenty years."

Pursuant to said authority to grant a natural gas franchise "on such terms and conditions as may be agreed to," the mayor and council of Kansas City, Kansas, did, on the 14th day of December, 1904, duly pass Ordinance No. 6051 of said city (Or. 54, pt. 33

to 40), which was on the 15th day of December, 1904, duly accepted (Or. 63, pt. 40) by the grantee, the Wyandotte Gas Company, and thereafter duly assigned to the plaintiff in error. (Or. 49, pt. 30.) Thereafter the grantee and its assign expended large sums of money for the natural gas plant and extensions therein provided and has paid to the city the 2 per cent of its gross receipts agreed upon (Or. 58, pt. 36), and duly done and performed all the terms, conditions and provisions of said ordinance, and has ever since said date charged and collected the schedule of rates fixed and agreed to therein (Rec. 55 and 63) without question or objection from said city or the State of Kansas until the commencement of this suit.

That according to the schedule of rates fixed and agreed to in said ordinance the price should commence at 25 cents per thousand cubic feet and increase from time to time to 35 cents per thousand cubic feet. (Or. 55 and 63, pt. 34 and 40.)

Thereafter the 1911 session of the Legislature passed an Act relating to public utilities, creating the Public Utilities Commission, prescribing its powers and duties and providing for the regulation and control of public utilities and providing penalties for the violation thereof. The material excerpts thereof are printed in the appendix. Sec. 20 provides that no change shall be made in any rate, toll or charge, without the consent of the Commission; Sec. 30 provides that unless the Commission shall otherwise order it shall be unlawful for any public utility to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same services on the 1st day of Jan-

uary, 1911; Sec. 38 imposes penalties not less than $100 and not more than $1,000 for such offense and makes every day during which such public utility shall fail to perform any duty required or enjoined by the Act constitute a separate and distinct offense; Sec. 39 provides that the Commission may compel compliance with the provisions of this Act by proceedings in mandamus, injunction or other appropriate civil remedies or by appropriate criminal proceedings in any court of competent jurisdiction.

Thereafter, and on or about November 19, 1911, the plaintiff in error became and was entitled, under the terms and schedule of rates fixed and agreed to in said Ordinance No. 6051, to increase its price for natural gas furnished to the inhabitants of said city from 25 to 27 cents per thousand cubic feet (Or. 49-50-51, pt. 30 and 31), which the company proceeded to do, believing in and relying upon the binding force and effect of said ordinance-contract. (Or. 36, pt. 20.)

Thereafter, and on or about January 4, 1912 (Or. 29, pt. 15), this suit was commenced in the name of the State on the relation of the attorney for and by order of said Commission (Or. 30, pt. 16) to enjoin said increase in rates, for the alleged reason and on the sole ground that the rate charged and collected on the 1st day of January, 1911, was 25 cents per thousand cubic feet, and that the increase of 2 cents per thousand cubic feet, notwithstanding the specific agreement therefor in said ordinance-contract, could not be effected, charged and collected because it was a change from said rate in force January 1, 1911, until ordered by the Commission, as provided by

Secs. 20 and 30 of said Act of 1911. (Rec., Or. 32 and 33, pt. 17 and 18.)

There is no claim that the contract has been breached, waived or rescinded or that the prices agreed upon are excessive, unreasonable or unfair, or that said gas is not intrinsically worth more than the agreed price, or that the contract was obtained by fraud or is unreasonable in point of time or was not necessary, or the inducement to procuring natural gas to said city and its people, or that the rate provision therein was not of the essence of said contract. The judgment stands alone upon the sole claim of right on the part of the state to repudiate a contract of one of its subordinate agencies for a claimed want of authority express or implied.

SPECIFICATION OF ERRORS.

The errors of the Supreme Court of Kansas appearing in the record and proceedings of said cause are specified as follows:

1. The court erred in holding and deciding that the natural-gas contract evidenced by Ordinance No. 6051 of Kansas City, Kansas, and authorized by Secs. 3 and 170a, Chapter 122, Laws of Kansas, 1903, was not a valid contract; and that the obligations of said contract were not entitled to protection against impairment under Art. 1, Sec. 10 of the Federal Constitution;

2. The court erred in holding and deciding that Secs. 3 and 170a, Chapter 122, Laws of 1903, did not authorize a valid and inviolable contract for natural gas between the Wyandotte County Gas Company and the City of Kansas City, Kansas;

3. The court erred in holding and deciding that the Public Utilities Act, Chapter 238, Laws of 1911, and Secs. 20 and 30 thereof, which prohibited the collection of the rates agreed to and fixed in said contract does not impair the obligations of said contract and contravene Art. 1, Sec. 10 of the Federal Constitution;

4. The court erred in holding and deciding that said Public Utilities Act, Chapter 238, Laws of 1911, and Secs. 20 and 30 thereof do not take plaintiff's property in said franchise-contract and its gas plant constructed thereunder without due process of law.

contrary to the 5th and 14th amendments to the Federal Constitution;

5. The court erred in rendering final judgment in favor of the State of Kansas and against plaintiff in error enjoining the collection of the rates fixed and agreed to in said franchise-contract.

BRIEF OF ARGUMENT.

The facts are admitted that a contract in terms in fact exists; that it fixes an agreed schedule of rates for a term of twenty years from December 14, 1904; that the plaintiff in error is entitled, measured by the terms of said contract, to charge twenty-seven cents per thousand cubic feet for natural gas; that it was charging, according to said contract, 25 cents per thousand cubic feet on January 1, 1911, and that the 1911 act of the legislature enjoins it from charging any price greater than the price collected on said 1st day of January, 1911; that it did commence to charge and collect said contract-rate of 27 cents on and after November 19, 1911; that at the suit of the State on the relation of the attorney for the Commission and by the order of said Commission said legislative injunction has been enforced by final judgment in the state courts; and that said act of 1911 prohibiting the collection of said contract-rates, in terms, impairs the obligations of said contract evidenced by Ordinance No. 6051 and its acceptance. The State admits the impairment of the contract, but denies that it was authorized. That is the question for determination.

The Construction of This Court Is Controlling.

This court will determine for itself whether or not a contract in law exists the obligations of which may not be impaired by legislation in contravention of the contract-clause of the Federal Constitution.

In *Louisville Gas Co.* v. *Citizens Gas Light Co.*, 115 U. S. 683-697, 6 Sup. Ct. Rep. 265, the court of last resort of Kentucky held that authority for a certain gas franchise was not plainly expressed in the statute.

In the opinion this court said:

> "The judges of the state court all concurred in the opinion that no such intent was plainly expressed. As this question is at the very foundation of the inquiry whether the defendant had a valid contract with the state, the obligation of which has been impaired by subsequent legislation we cannot avoid its determination. Whether an alleged contract arises from state legislation, or by agreement with the agents of a state by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment, and independently of the adjudication of the state court, to decide whether there exists a contract within the protection of the Constitution of the United States."

This question was settled in *McCullough* v. *Commonwealth of Virginia*, 172 U. S. 102. In that case the Commonwealth in 1871 refunded its debt and authorized the issuance of coupon bonds receivable on and after maturity for taxes, debts due and demands of the state. Thereafter, the general as-

sembly passed several acts culminating in a provision that only lawful money of the United States was receivable for taxes and demands due the Commonwealth. In a suit prosecuted by a coupon holder to establish the genuineness of certain coupons tendered in payment of taxes, the Supreme Court of Appeals of that state rendered judgment in favor of the Commonwealth, dismissing the plaintiff's petition and holding that the original statute authorizing the issue of the coupons was void. On motion to dismiss the writ of error for want of a Federal question this court held:

> Syllabus 2. "Whether or not a state statute creates a valid contract is a question upon which the Supreme Court is not bound by the decision of the Supreme Court of the state in a suit in which such contract is claimed, and the question of the impairment of its obligations by subsequent legislation is involved."

Mr. Justice Brewer, delivering the opinion of the court, said:

> "It is insisted that, whatever may be our own opinion upon the case, we are to take the construction placed by the Court of Appeals of Virginia upon the act as the law of that state. While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a state upon its statutes and Constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in *Bank* v. *Skelly*, 1 Black 436, 443, in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to

revise the judgment of the Supreme Court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligations of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract, and within the protection of the Constitution of the United States, and that its obligations should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a state? It never was intended and cannot be sustained by any course of reasoning, that this court should or could with fidelity to the Constitution of the United States follow the construction of the Supreme Court of a state in such a matter, when it entertained a different opinion.' The doctrine thus announced has been uniformly followed. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 145; *Wright* v. *Nagle*, 101 U. S. 791, 793; *McGahey* v. *Virginia*, 135 U. S. 665, 667, 10 Sup. Ct. 972, 974."

In the recent case of *Crosslake Shooting and Fishing Club* v. *State of Louisiana*, 221 U. S. 632, the court again laid down the rule as follows:

"But when the state court either expressly or by implication gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine

the existence and validity of the contract, what obligations arise from it and whether they are impaired by the subsequent law."

Vicksburg v. *Vicksburg Water Co.*, 185 U. S. 65.

Power of Rate Regulation May Be Suspended by Contract.

That the governmental power of rate regulation of public utilities, whether by the state or its agencies, may be suspended by contract of the state or by its authority is no longer an open question.

In *Home Telephone and Telegraph Co.* v. *Los Angeles*, 211 U. S. 265, Mr. Justice Moody delivering the opinion of the court said:

> "It has been settled by this court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation or natural person for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates," citing:
>
> *Detroit* v. *Detroit Citizens St. R. Co.*, 184 U. S. 368.
> *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496.

Even in *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, this Court said:

> "Municipal corporations may be invested by statute with power to bind themselves by an irrevocable contract not to regulate rates."
>
> *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558.
> *Walla Walla Water Co.* v. *Walla Walla*, 172 U. S. 1.

New Orleans Water Works Co. v. *Rivers*, 115 U. S. 674.

Louisville, Ky., v. *Cumberland Teleph. & Teleg. Co.*, 224 U. S. 649.

Vicksburg v. *Vicksburg Water Co.*, 185 U. S. 65.

Vicksburg v. *Vicksburg Water Works Co.*, 202 U. S. 453.

Minneapolis St. R. Co. v. *Minneapolis*, 215 U. S. 417.

Authority to Suspend Power of Rate Regulation Must Be Conferred.

That the power to fix and regulate rates is governmental, inherent in the state, and does not inhere in the subordinate subdivision of the state; and that such power, if exercised by a municipality, must be conferred by the state and cannot be assumed is well settled.

Home Teleph. & Teleg. Co. v. *City of Los Angeles*, 211 U. S. 265.
Freeport Water Co. v. *Freeport*, 180 U. S. 587.
Stanislaus County v. *San Joaquin & K. R. Canal & Irrigation Co.*, 192 U. S. 201.

Express Authority.

That municipal authority to suspend by contract the power of rate regulation may be conferred by *express* legislative grant is not controverted and needs no citation or authority.

Implied Authority.

That the authority to suspend by contract the state's power of rate regulation may be conferred by necessary implication is equally well settled. While we contend in the case at bar that express authority was conferred by the grant of authority to agree on terms, we desire to impress upon the Court, that all that is necessary is that the power be conferred, and that a delegation of power by implication necessary to the exercise of an express power conferred is fully as authoritative and binding upon the State as the most detailed and unequivocal delegation of authority. The essential thing is that the power be in fact conferred.

In *Home Telephone & Telegraph Co.* v. *Los Angeles*, 211 U. S. 265, this Court said that the municipal authority to suspend by contract "the power of regulation, must, at the very least, necessarily be implied from the controlling statutes."

In *Minneapolis St. R. Co.* v. *Minneapolis*, 215 U. S. 417, the court, in construing the statutes of Minnesota authorizing the 5-cent fare street railway contract in Minneapolis, said in the opinion:

> "Statutes and ordinances of this character are not to be extended by construction, nor should they be deprived of their meaning, if it is plainly and clearly expressed."

See also, *Vicksburg* v. *Vicksburg Water Co.*, 206 U. S. 496.

Examining the statutes of the State of Kansas relating to cities of the first class in force at the time of the passage and acceptance of Ordinance No. 6051, we find there is no ambiguity either in the ordinance or the statute which gives the city or the State any right or excuse to repudiate the schedule of rates agreed to in said ordinance.

Authority to Agree on Terms and Conditions Is Express Authority for the Terms and Conditions Agreed To.

The Act relating to cities of the first class expressly confers ample authority upon Kansas City, Kansas, to suspend by contract the State's power of rate regulation by providing that:

> "The mayor and council of any such city are hereby authorized to grant, to any person, company, or corporation, a franchise to construct, maintain and operate a natural gas plant for the purposes of furnishing to said city and its inhabitants natural gas for lights, fuel, and all other purposes, with authority to lay all necessary mains and pipes in the streets, avenues, alleys and public grounds of said city, *on such terms and conditions as may be agreed to by said mayor and council and such person, company, or corporation: provided*, that such franchise shall not continue for a longer period than twenty years."

The 1903 session of the Legislature revised, reenacted, amended and enlarged all the Acts relating to the cities of the first class in one Act as Chapt. 122 of said session. All parts thereof bearing on the question of authority for said contract are printed in the appendix in full.

Art. I, Sec. 2, provides that all cities of the first class shall be governed by the provisions of that Act.

Art. I, Sec. 3, creates such city a body-corporate and politic with power to sue and be sued, to purchase, receive and hold real and personal property for the use of the city, to sell and convey the same and make such order respecting the same as may be deemed conducive to the interests of the city, and to provide for the improvement, regulation and government of the same; and "To *make all contracts* and do all other acts in relation to the property and *concerns of the city necessary to the exercise of its corporate and administrative powers*"; and to exercise such other and further powers as may be conferred by law.

Art. I, Sec. 5, provides that the powers granted shall be exercised by the mayor and council.

Art. IV—*Legislative department; powers of the mayor and council:* Sec. 21 provides that "the mayor and council shall have the care, management and control of the city and its property and finances; and shall have power to enact *ordinances* for all the purposes named and provided for in this *article* not repugnant to the Constitution and laws of this state, and to *alter, amend, modify and repeal such ordinances.*"

Under this legislative power there are forty-three sections conferring general governmental powers of regulation over a great many matters and subjects, among which are the following:

Sec. 23. To provide for lighting the streets and the erection of lamp posts.

Sec. 26. To regulate the construction and location of billboards, signs and other appliances on the public streets and property adjacent thereto.

Sec. 32. To adopt measures for the protection of strangers and the traveling public.

Sec. 33. To fix the rate of carriage of persons and drayage, carriage and transportation of property other than by railroads operated by steam.

Sec. 43. To make all needful police regulations necessary for the preservation of good order and the peace of the city and to prevent injury to or the damage of or interference with public or private property.

Sec. 44. To impose fines, forfeitures and penalties for violation of ordinances.

Sec. 50. To prohibit and suppress objectionable games and disorderly houses.

Sec. 51. *To prescribe and fix reasonable and just maximum rates for public utilities*, and providing for appeal to the courts from unreasonable and unjust rates and charges. See text in Appendix, page 89.)

Sec. 52. To provide for the punishment of persons injuring, destroying or wasting the property of any public utility.

Sec. 53. To grant rights-of-way upon the streets for telegraph, telephone and electric light poles and wires.

Sec. 54. *To grant street-rights* for the purpose of laying water, steam or gas pipes or conduits for electric light or power, telegraph, telephone and other uses, for a period not longer than *thirty* years. (See text, Appendix, page 90.)

Sec. 56. To make regulations to secure the general health of the city and the general exercise of the police power.

Sec. 58. To regulate the public grounds and ways of the city.

Sec. 64. To vacate and close streets and alleys.

From an examination of the act and sections above referred to it will be seen that the powers conferred under Art. IV of Chapt. 122 are purely legislative or governmental in character; that they deal with every phase of the governmental activities of a city; that ample power is there given to grant naked street-rights for all proper public utilities; that if there was no intent on the part of the legislature to authorize a natural gas rate contract or to empower the city to negotiate and acquire a natural gas supply, no further or additional provisions would be necessary to authorize a mere natural gas street-rights grant or franchise.

Art. V of the act deals exclusively with the executive department of the city government.

Art. VI deals exclusively with the judicial or police department.

Art. VII covers the subject of special assessments and taxation.

Art. VIII deals with public improvements and confers upon the mayor and council power to make all needed repairs, improvements and extensions of the public streets and highways.

Art. IX deals specificially with public utilities.

Secs. 165 and 166 make detailed provision for water plants.

Sec. 167 provides in detail for the erection, management and control of water plants and contracts for hydrant rentals, and specifically reserves to the mayor and council the power, "At all times during the existence of any *such* grant, contract or privilege * * * to fix a reasonable schedule of maximum rates," for such water service.

Sec. 168 details the procedure for the purchase of such water plant.

Sec. 169 is very significant; it is more conspicuous for what it does not authorize than for what it does authorize. First, it does not authorize a street-rights grant at all, it merely authorizes a "Permit * * * to *manufacture*, sell and furnish *gas light*"; second, it does not authorize the furnishing of such manufactured gas light to the *inhabitants* of said city at all; it merely authorizes a permit to manufacture, sell and furnish gas light, electric light, power or heat "*to any city*"; and such permit or any renewal thereof must be upon the conditions "hereinafter provided in this act, which shall be specifically provided for in the ordinances and contracts"; and no such right shall extend for a "longer period than *thirty* years."

It is quite apparent that this section deals exclusively with *manufactured gas* as distinguished from natural gas; that it deals with the *utility* or manufacturing plant and its right to exist and operate within the corporate city, rather than the matter of street rights; that it refers to contracts, permits or

dealings with the *corporate city*, rather than its people, its inhabitants or the general public. To find authority for street-rights grants and for the right to furnish gas to the inhabitants as distinguished from the corporate city itself, we must look elsewhere in the statute. Referring back to the general legislative powers of the city, we find in Sec. 54 plenary power "To grant the use of the streets for the purpose of laying gas pipes to be used in furnishing or supplying such city and its *inhabitants* with light, heat or power." But this delegation of power is purely legislative, as above indicated; there is no delegation of authority here to agree-to contract.

Reverting back to Sec. 169, we find that the "permit" to "manufacture, sell and furnish gas light," electric light, power or heat "to said city," must be upon conditions "hereinafter imposed in the act and specifically provided for in the ordinance" granting such permit.

Following the foregoing reference to "conditions hereinafter imposed in this act," we find in the next section, 170, as a condition for a franchise to lay pipes through the streets of the city for light or heat, or to string electric wires for light or heat to supply the inhabitants with light, heat or power, the city may require in the ordinance granting such franchise or privilege a report once in six months; that the grantee pay into the city treasury 10 per cent of its net earnings over and above 10 per cent on its investment; that all existing franchises may be extended for a period not exceeding "*thirty* years"; that the mayor and council "shall at all times during the existence of any *such* grant, contract or priv-

ilege, have the right by *ordinance* to fix a reasonable schedule of maximum rates to be charged for public and private purposes, including street lighting * * * to the inhabitants of any such city for *gas light*, electric light, electric power, or heat; provided, however, that said mayor and council shall at no time fix a rate which will prohibit * * * earning at least 10 per cent on its capital invested in such city over and above its reasonable operating expenses and the expenses for maintenance and taxes."

It is very clear that this section contains the subject matter referred to in Sec. 169 as "the conditions hereinafter imposed in this act, which shall be specifically provided for in the ordinance" granting the franchise; it is *in pari materia* and continues to deal with the same subject matter, to-wit, manufactured gas, electricity and street railways; it refers back to the grants under consideration as "*such* franchise or privilege." It speaks of *gas light*, referring to the most general use of manufactured gas at that time as distinguished from the dominant use of natural gas for *fuel*, *heat* and *power* purposes; it speaks of renewals and extensions of such manufactured gas franchises as distinguished from new franchises or contracts for acquiring and procuring a natural gas supply; it provides for thirty-year street-rights grants, subject to rate regulation, as distinguished from twenty-year natural gas supply contracts; and it expressly reserves the right, "at all times during the existence of any *such* grant, to fix a reasonable schedule of maximum rates to be charged * * * for gas *light*, electric light, electric power, or heat, and the rates of fare on any street railway."

dealings with the *corporate city*, rather than its people, its inhabitants or the general public. To find authority for street-rights grants and for the right to furnish gas to the inhabitants as distinguished from the corporate city itself, we must look elsewhere in the statute. Referring back to the general legislative powers of the city, we find in Sec. 51 plenary power "To grant the use of the streets for the purpose of laying gas pipes to be used in furnishing or supplying such city and its *inhabitants* with light, heat or power." But this delegation of power is purely legislative, as above indicated; there is no delegation of authority here to agree-to contract.

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Under this section no one would contend that the mayor and council had the power even to grant street-rights for natural gas or to regulate the rates for natural gas.

Further, "conditions hereinafter imposed in this act," referred to in Sec. 169, are found in Sec. 170a. The first part of this section shows that the legislature is still dealing with the subject matter of manufactured gas, electricity and street railways; it provides a course of procedure by which the city may acquire title to any such plant upon the termination of any franchise.

Then, at the close of said Sec. 170a, and after fully covering every phase and feature of manufactured gas and all other common utilities in existence and common use, the legislature, with full knowledge that manufactured gas was then being furnished to Kansas City, Kas., and that natural gas was a new and untried experiment, approximately 200 miles away, and commanded the expenditure of millions of capital to mine, produce and transport it to said market; and presumably knowing the fleeting and uncertain character of the natural product as distinguished from the comparatively fixed cost and permanency of manufactured gas; and presumably knowing that manufactured gas could not be produced economically and commercially in sufficient quantities for general fuel and power purposes; and to remove all limitations, restraints and handicaps upon said city in its efforts and negotiations to secure the natural product, issued the state's blanket grant of authority and expressly removed all limitations and restrictions in the entire act in the following plain and concise language:

"Art. IX—*Public Utilities*—Sec. 170a. * * * '*Nothing* in this *act* shall be *construed* as prohibiting any city governed and controlled by the provisions of this act from granting, and the mayor and council of any such city are hereby *authorized* to grant, to any person, company or corporation a franchise to construct, maintain and operate a *natural gas plant* for the purposes of furnishing to said city and its inhabitants *natural gas* for lights, *fuel and all other purposes*, with authority to lay and maintain all necessary mains and pipes in the streets, avenues, alleys and public grounds of said city *on such terms and conditions as may be agreed to* by said mayor and council and such person, company or corporation; provided, that *such* franchise shall not continue for a longer period than *twenty* years.'"

It would hardly seem necessary to present argument or authority to support the proposition that authority, "to agree on terms," is the authority for the terms agreed on. It staggers the power of reason to attempt an analysis of this plain and concise language. The first clause specifically eliminates all prior restrictions, conditions, limitations and handicaps upon the power to grant natural gas franchises. "Nothing in this Act,"—that sweeping language includes the express reserve power to regulate rates; it includes the requirement to pay 10 per cent of the net receipts to the city; it includes the reserve power and right to purchase the plant; it includes the requirement to render semi-annual statements; it includes the thirty-year franchise limitation; it starts the city off free and untrammeled by any and all statutory limitations; the sole power and authority to act and the measure, extent and limitations of

that power must be found in the provision relating to natural gas above quoted; there we find the power to grant a natural gas franchise with the necessary street rights appurtenant thereto, not by ordinance, not by legislative command, not by the exercise of governmental power—on the contrary, by the exercise of private corporate power—by contract—"on such terms and conditions as may be agreed to"—an agreement, the meeting of minds is the first element of a contract. There is but one limitation upon the exercise of that power to agree, and that is that whatever franchises there may be included in that agreement shall not continue for a longer period than twenty years. Under this broad sweep of authority the city may have given an exclusive franchise for twenty years; it may have included a street lighting contract for twenty years; it might have fixed the purposes for which natural gas should be used; it might have stipulated the sources from which it should come. Any "terms and conditions," not grossly inequitable or fraudulent, deemed necessary in the wisdom and discretion of the mayor and council to procure said natural product were included in the authority to deal, "on such terms and conditions as may be agreed to," save only the limitation as to time.

The Legislature knew that a wide discretion must be exercised by the mayor and council in order to procure a supply of said gas to said city and its inhabitants; it knew that the mining, development and production of said gas in the fields and the transportation thereof to said markets and the additional facilities for the distribution thereof required the expenditure of millions of capital; it knew that

any limitation upon the authority and power of the mayor and council, any reservation of the power to regulate rates, any restriction on the title of the property, any want of power to fix for a definite term of years the return and revenues upon such enterprise and investments would absolutely defeat the hope and expectation of said city ever securing natural gas. It therefore clothed the mayor and council with plenary power to contract, limited only in point of time. The authority to agree on terms is as broad, comprehensive, sweeping and unlimited as the actual terms agreed on and stipulated in the ordinance. The State merely said to its agent: "Go and agree on the terms necessary to get this gas, with the one restriction that your agreement shall not continue for a longer period than twenty years." It clothed its agent with all the inherent powers of contract of a private individual with the one limitation.

To extend by construction the provision in Sec. 170a, relating exclusively to natural gas franchises, to include the power to regulate rates contained in Sec. 51, and the express reservation of that power in Sec. 170 dealing exclusively with manufactured gas and other franchises, is to do violence to the plain language and mandate of the Legislature that "Nothing in this *Act* shall be construed as prohibiting the mayor and council from granting a natural-gas franchise," and to still further ignore the plain authority "to agree on terms," the most essential of which is the matter of rates. Again, if the State's contention that the rates could not be fixed for a term of years is tenable, still the positive mandate of the Legislature remains, that whatever

rates are to be put in force from time to time must be "on such terms and conditions as may be agreed to." Thus, we see that the measure of the authority for the contract in question is the terms and conditions embraced therein.

Turning now to the instrument itself (Or. 54, pt. 33), we note that it is an ordinance in form, but an offer to contract in substance and fact. The first seven sections enumerate the benefits or rights which the city offers to confer upon the Company; the 8th section, consisting of fourteen separately numbered paragraphs, enumerates the benefits, advantages and considerations moving to the city, and they are expressly named "considerations" for the rights and privileges therein granted. It begins as follows: "The rights, privileges and franchises herein granted are for the following *considerations* and upon the following conditions, to-wit." Paragraph 12 expressly provides that the city's offer tendered by the ordinance shall be accepted by the Company: "that said grantee shall within ten days after the passage of this ordinance file in the office of the city clerk of said city a written acceptance of the *terms*, obligations and conditions set forth which shall be approved by the mayor and council."

Sec. 1 recites that, "for and in *consideration* of the *benefits* to the city of Kansas City, Kansas, and its inhabitants, and upon the *terms* and conditions hereinafter prescribed," the right and authority for a period of twenty years is granted to supply, sell and furnish natural gas to said city and its inhabitants.

This offer to contract on the part of the city was duly accepted by the grantee on December 15,

1904, and thereafter on or about November 28th, 1908, duly assigned to plaintiff in error (Or. 49, pt. 29), and all of the terms, obligations, conditions and requirements of said contract have been duly observed, kept and performed by all parties and privies thereto until the commencement of this suit.

If all the provisions, conditions, limitations and requirements of the statutes relating to manufactured gas and to franchises in general were applicable to this ordinance, then the specific exclusion of said provisions and the grant of authority for this natural-gas franchise on terms and conditions to be agreed to is but an idle repetition—a mere chanting over by the legislature of the powers and authority theretofore conferred. Such cannot be imputed to the legislature.

Authorities Construing Similar Statutes—Authority to Contract Distinguished From Authority to Legislate.

An analysis of the decisions discloses a clear distinction between a delegation of authority to contract or agree and a delegation of authority to grant a franchise or to legislate. The one is the mutual meeting of the minds of two negotiating parties, the other is the sole sovereign act of a single party. The one authorizes consent, the other command. Any language of the legislature sufficient to denote an intent on the part of the legislature to authorize a consent, not a command, is sufficient authority from the state for an inviolable contract.

In the recent case of *Vicksburg* v. *Vicksburg Water Company*, 206 U. S. 496, the syllabus reads:

> Authority vested in the city, "To provide for the erection and maintenance of a system of water works to supply the city with water, and to that end, to *contract* with a party or parties who shall build and operate water works," is sufficient authority to empower a city to contract with the water works company "fixing maximum water rates to private consumers for thirty years, which contract is protected against impairment by the contract clause of the Federal Constitution."

In the opinion the court said:

> The grant of legislative power upon its face is *unrestricted* and authorizes the city "to provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to *contract* with a party

or parties who shall build and operate water works."

That a state may, in matters of *proprietary* rights, exclude itself from the right to make regulations of this kind or authorize municipal corporations to do so, when the power is clearly conferred, *has been too frequently declared to admit of doubt.* Citing:

Los Angeles v. *Los Angeles City Water Co.*, 177 U. S. 558.
Walla Walla Water Co. v. *Walla Walla*, 172 U. S. 1.
New Orleans Water Works v. *Rivers*, 115 U. S. 674.
Freeport Water Co. v. *Freeport*, 180 U. S. 587.

(Here this court construes and confines the Freeport case to very close limits.)

Notice in this case there are no specific words saying "authorized to fix rates"; the idea of an *agreement* of the parties is all that appears.

In *Vicksburg* v. *Vicksburg Water Co.*, 202 U. S. 453, the rules for which we contend were expressly upheld, as follows:

> A municipality in exercising the authority conferred by its charter to provide for the erection and maintenance of a system of water works to supply the city with water, and, to that end, *to contract* with a party or parties who shall build and operate water works, *may exclude itself from constructing and operating water works of its own for the term covered by such contract.*

The case of *Detroit* v. *Detroit Citizens Street Ry. Co.*, 184 U. S. 368, is forcibly in point, in that the authority to grant the use of the streets for street railway purposes was "*Upon such terms and condi-*

tions as may be agreed upon by the company and the township board," almost the identical language of the case at bar. The court in that case, even though the same statute expressly authorized the board to fix rates from time to time, held that the authority to fix rates in the franchise was as broad as the terms of the franchise-contract itself, and that such contract was irrevocable without the consent of both parties.

The statute authorizing this contract reads as follows:

> "Sec. 13. Any street railway corporation organized under the provisions of this Act, with the consent of the corporate authorities of any city or village given in and by an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations and conditions as are and by such ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways in said city or village as shall be designated and granted from time to time for that purpose in the ordinance or ordinances granting such consent, but no such company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use the streets; and any such company may extend, construct, use and maintain their road in and along the streets or highways of any township adjacent to said city or village *upon such terms and conditions as may be agreed upon by the company and the township board of the township*, which agreement and the acceptance by the company of the terms thereof shall be recorded by the township clerk in the records of his township."

"Sec. 20. The rates of toll or fare which any street railway company may charge for the transportation of persons or passengers over their road shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and shall not be increased without consent of such authorities."

The syllabi read as follows:

"2. A state legislature, unless prohibited by constitutional provisions, may authorize a municipal corporation to *contract* with a street railway company as to *rates of fare*, and so to *bind during the specified period any future common council from altering or in any way interfering with such contract*."

"3. Binding agreements relative to rates of fare betewen a municipality and street railways organized either under the Michigan tram railway act as amended in 1861, or under the street railway act of 1867, which cannot be altered without consent of both parties, were expressly authorized by Sec. 20 of the latter act, declaring that street railway rates shall be established by agreement between the company and the corporate authorities, the provisions of which section were by Sec. 29 made applicable to all street railway corporations already organized and in operation."

"4. An ordinance adopted under legislative authority, which provides that the rate of fare to be charged by a street railway company shall not exceed 5 cents, gives the company, when accepted by it, a contract right to charge that rate, which cannot be reduced by the city without the consent of the company under the right to prescribe from time to time rules and regulations for the running and operating of the road."

"5. No permission to municipal authorities to reduce street railway fares without the consent of the company below the rate at which they were fixed in compliance with the Michigan street railway act of 1867, Sec. 20, which declares that such rates shall be established by agreement between the parties, can be implied from the further provision of that section that the rates of fare agreed upon shall not be increased without the consent of the city authorities."

The opinion construing the language of this statute, and the contract so fits the facts and circumstances of the parties in the case at bar at the time of contracting, we quote (our italics):

"The rate of fare is among the *most material* and important of the *terms and conditions* which might be *imposed by the city in exchange for its consent to the laying of railroad tracks*, and the running of cars thereon through its streets, to be a subject of grave consideration and *conference between the parties*, and, when determined by *mutual agreement*, the rate would naturally be *regarded as fixed* until another rate was adopted by a *like agreement*. Can it be possible that under this language permitting *consent upon such terms and conditions* as the city might from time to time prescribe, *the power was reserved to make a rate of fare which might ruin the whole enterprise?* That a rate once *deliberately* and *mutually agreed* upon might be thereafter from time to time *altered at the pleasure of the city alone?* Will it be believed that parties thus understood the meaning of that provision? It would hardly be credible that *capitalists about to invest money in what was then a somewhat uncertain venture* while procuring the consent of the city to lay its rails and operate its road through the streets in language which as to the rate of fare amounted to a contract, and

> gave the company a right to charge a rate *then* deemed essential for the *financial success* of the enterprise, would at the same time consent that such rate *then agreed upon* should be subject to change from time to time by the *sole decision* of the common council. * * * It is unnecessary to conclusively determine the question (construing the wording of the franchise itself), because we think that under (the acts above quoted), *binding agreements* were made and entered into *between the city on the one side and the company on the other, relating to rates of fare*, and such agreements *could not be altered without consent of both sides* * * * it is plain that the *legislature regarded the fixing of* rate of fare over these street railways as a *subject for agreement* between the parties, and *not* as an *exercise of a governmental function* of a legislative character by the city authorities under a delegated power from the legislature. It was matter in the nature of *agreement* by the *expressed command of the legislature.*

So in the case at bar, by express legislative command the "*terms and conditions*" on which natural gas was to be furnished to Kansas City might "be agreed to."

In *Omaha Water Co.* v. *City of Omaha*, 147 Fed. 1, almost the identical language of our statute was construed as authorizing the city to execute an inviolable contract. The syllabus reads:

> "The legislature empowered the city of Omaha to contract with individuals or corporations for the construction and maintenance of water works, "*On such terms and under such regulation as may be agreed on.*" The city by ordinances offered the contract for the construction of the works and their operation for twenty-five years to the lowest bidder on condition that he would first accept the terms of the ordinance,

which provided that the contractor should furnish water to private consumers during the term at such prices as the contractor and the consumer should agree upon, not exceeding certain specified rates. The contractor accepted the ordinance, and his assigns constructed the works and operated them for twenty years. The Water Board of the city ordered the rates reduced below those specified in the ordinance. *Held*, the accepted ordinance was a *contract*, the order of the Water Board *impaired* its obligation and the water company was entitled to an injunction to restrain its execution."

The opinion says:

"A city has *two* classes of power, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other *proprietary or business*, by means of which it acts and *contracts* for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public, and they may make no grant or contract which will bind the municipality beyond the terms of their offices, because they may not lawfully circumscribe the legislative powers of their successors. But, in the exercise of the *business powers* of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way, and in their exercise, the city will be *governed by the same rules which control a private individual* or a business corporation under like circumstances. In contracting for the construction or purchase of water works to supply itself and its inhabitants with water, a city *is not exercising its governmental or legislative function, but is using its business or proprietary power.* The purpose of such a contract is not to *govern* its inhabitants, but to obtain a private benefit for

the city and its denizens. *Illinois Trust & Sav. Bank* v. *Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 182, 40 U. S. App. 257, 76 Fed. 271, 292, and cases there cited."

"The power to fix and to regulate the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities, *partakes of the nature of a governmental power*, and *also* of that of a *business power*. Are the inhabitants of a city paying rates not fixed by contract to *quasi* public corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power, which the state or city may exercise, but may not renounce. Is a *city without water works* (natural gas), *and hence without rates at which anyone will furnish water therefrom to the municipality or its inhabitants?* The making of a contract for the construction and operation of water works, wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years, *is the exercise of one of the business powers* of the corporation. The purpose of such a contract is *not to regulate rates, for there are no rates to regulate*. It is to procure water and to get rates for the city and for its inhabitants. Hence it is that the legislature of a state, unless prohibited by its constitution, may empower a city to *suspend by contract*, and a city may suspend in that way during a reasonable term of years, *its power to change or regulate the* rates which an individual or corporation may collect of private consumers."

We think this case illustrates a fundamental principle controlling in the case at bar. When a city is wholly without a utility and needs it and the legislature has endeavored to empower the city to get it, that authorization should be construed suf-

ficiently liberal to accomplish the legislative intent and the desired result. It cannot be presumed that the legislature is speaking in unknown tongues or seeking to entrap and ensnare investors, or to get something for nothing.

Los Angeles v. *Water Co.*, 177 U. S. 558, is instructive, in that it clearly distinguishes between a legislative grant to contract and one to regulate. The statute construed as giving the right to contract merely authorized the municipal authorities "To provide for supplying the city with water."

The contract provided:

> "That the mayor and common council of said city shall have and do reserve the *right to regulate* the water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged by the parties of the second part for water."

Subsequently the city passed an ordinance fixing lower water rates during the remainder of the term than those fixed in said ordinance. The company enjoined the enforcement of the ordinance.

The syllabus reads:

> "Reservation by a city in a lease of its water works of the right to regulate rates, provided they be not reduced below the then existing rates, must, if valid, be deemed to be a limitation upon the right of the city as a municipality to regulate water rates, and not a mere granting back by the lessees of the right of the city in its proprietary capacity.
>
> "A contract authorized by the existing state constitution as then construed by the highest court of the state, cannot be affected by a subsequent change in the decisions of that court or by the adoption of a new constitution."

In the opinion the court said:

"The municipal powers of the city provided in the act of incorporation, among others, were: 'To make by-laws or ordinances, * * * to make regulations to prevent and extinguish fires, * * * *to provide for supplying the city with water.*

"It is not denied that the city had power to regulate rates. Indeed, it is insisted that it was so constantly its duty that it could not be contracted away. It was not a power, therefore, necessary to be granted by the contract, and the distinction between the proprietary right and the municipal right made by appellants would have been idle to observe. *To have limited the right of regulation to the city in one capacity*, and *left it unrestrained in the other, would have been useless*, and such intention cannot be attributed to the parties. We think, therefore, the power to regulate rates was an existing power, not granted by the contract, but reserved from it, *with a single limitation, the limitation that it should not be exercised to reduce rates below what was then charged.* Undoubtedly there was a *contractual element:* it was not, however, in granting the power of regulation, but in the limitation upon it. Whether the limitation was and is valid is another consideration."

(The court here reviews the authorities and decisions of that state and proceeds):

"The principles enumerated in the foregoing cases are *eminently sound and just*, and are directly applicable to the case we are now considering. The city of Los Angeles, by its *solemn contract* and for various considerations therein stated, gave to the party under whom defendant claims the privilege of introducing, distributing and selling water to the inhabitants of that city, on *certain terms and conditions*, which defendant has complied with, and it was not within the power of the city authorities, by ordinance or

> otherwise, afterward to impose additional burdens as a condition to the exercise of the rights and privileges granted."

If this be eminently sound and just with respect to a water supply, how much more so is it with reference to a *natural gas* supply, which must be mined from the bowels of the earth and transported at enormous cost the width of the state?

The late case of *Minneapolis* v. *St. Ry. Co.*, 215 U. S. 417, is more than helpful in construing the statute in this case. The municipal authorities had granted street railway franchises in which they fixed the fares for a term of fifty years without any authority whatever either to grant franchises or to fix rates. Thereafter the legislature passed a curative act, validating,

> "The grant to the Minneapolis Street Railway Company right to construct and maintain a street railway through the streets of said city, *with certain rights and privileges in said ordinance particularly set forth.* (P. 122.)"

It will be observed that this language is tantamount to authorizing "the terms and conditions agreed to."

Thereafter the city passed a regulatory ordinance requiring the company to sell six-fare tickets for a quarter. The court held that this curative act,

> "Secured to the company for fifty years from July 1st, 1873, the contract right to charge five cents per passenger for one continuous trip."

And that the,

> "Requirement of the regulatory ordinance that the company should operate its roads by the sale of tickets six for a quarter as required by the ordinance of February 9, 1907, *was an en-*

actment by legislative authority which impaired the obligation of the contract thus held and owned by the complainant company. (P. 125.)"

In that case the legislative act, in terms only, validated the right to construct, maintain and operate street railways "*under the rights and privileges set forth*" in the ordinance. In the case at bar the legislative authority is to grant franchises to construct, maintain and operate gas plants "on such terms and conditions as may be agreed to." This language is equivalent and more comprehensive than the language used in this curative act, *viz.*: the terms "in said ordinance *particularly set forth*"; in fact, the authority is as broad as the terms of the executed contract.

The court said, p. 124:

> "It needs no argument to demonstrate that the right to charge passenger fares is of the *very essence of the contract, essential to the operation and success of the enterprise.*"

It needs no argument to demonstrate that no agreement could have been reached between Kansas City and the company without agreeing on the price essential to the operation and success of the enterprise of bringing natural gas to Kansas City.

The syllabus read:

> "The contract right of a street railway company to charge 5-cent fares, secured against impairment 'during the terms of its charter' by a municipal ordinance ratified by Minn. Act of March 4, 1879, extends for fifty years, where the company undertook to organize for that period, under the Minn. laws of 1866, Chap. 34, tit. 1, and in its certificate of incorporation

stated that its corporate life was to be for that term, and has continued to act as a corporation since the expiration of the thirty years, which would have been its corporate life, if organized as the municipality contends it should have been under tit. 2 of such chapter.

"3. The contract right of a street railway company to charge the rate of fare permitted by a municipal ordinance vests in such company, *secure against impairment by subsequent legislation*, when ratified by a valid legislative act, notwithstanding the want of power of the city to adopt the ordinance."

The court further says:

"In considering the terms of this ordinance and what it undertook to accomplish on its face, we are to bear in mind that public grants of this character are not to be extended by implication, and that all that is granted must be found in the plain terms of the Act. This principle has been so frequently and recently announced in this court that it is unnecessary to cite the cases which have established it. Recognizing this principle, it must also be remembered that grants of the character of the one under consideration here, when embodying the terms of a contract, are protected by the Federal Constitution from impairment by subsequent state legislation, and *notwithstanding the principle of strict construction, whatever is plainly granted cannot be taken from the parties entitled thereto by such legislative enactments. Statutes and ordinances of this character* are not to be extended by construction, nor should they be *deprived of their meaning*, if it is plainly and clearly expressed."

In the case at bar plaintiff in error is claiming nothing by way of implication or construction either of the *statute* or the *ordinance*. We are claiming only the "terms and conditions agreed to," and the au-

thority to deal "on such terms and conditions as may be (were) agreed to."

The case of *Walla Walla Water Co.* v. *Walla Walla*, 172 U. S. 1, construes language less specific than our statute:

> "By an Act of the Territory of Washington incorporating the city of Walla Walla it was enacted, Sec. 11, that the city should have power * * * *to provide a sufficient supply of water* * * * to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light, or water to any person, or association of persons, for a term not exceeding twenty-five years."

Under this authority the city granted a franchise and fixed rates for a term of twenty years. The Supreme Court held this franchise an inviolable contract:

> "The grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state, and, after the performance by the grantee, *is a contract protected* by the Constitution of the United States *against state legislation to impair it*, and this is equally the case whether the grant is made directly by the legislature or by municipal authorities to whom the right has been delegated by a charter, and the courts of the United States have jurisdiction by a suit to protect such contract rights from impairment by subsequent legislation by either the state or the municipality, as the case may be."

The case of *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, was a suit based on a contract evidenced by ordinance authorizing plaintiff to construct and maintain a water works in the city of Freeport. To the defense of a subsequent ordinance reducing the hydrant rentals, it was claimed by way of demurrer that the latter ordinance impaired the prior contract. The demurrer was overruled, and the Illinois Supreme Court sustained that ruling. On review the Supreme Court sustained the ruling of the Illinois court on the ground of a peculiarly worded statute of that state, and the construction *previously* placed thereon by the Illinois Supreme Court, but the court construing the opinion of the Illinois court said:

> "It is *not clear* from the opinion of the court whether it intended to decide that municipal corporations *could not be invested* with a power to *bind themselves* by an *irrevocable contract* not to regulate water rates. *If so, we cannot concur in that view.* We have decided to the contrary many times, and very lately, in *Los Angeles* v. *Water Co.*, 177 U. S. 558, and *Walla Walla Water Co.* v. *Walla Walla*, 172 U. S. 1, where the subject is more extensively discussed and the cases reviewed. See also *New Orleans Water Co.* v. *Rivers*, 115 U. S. 674."

The syllabus of the Freeport case reads:

> "Municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract not to regulate water rates."

(We return to this case later.)

In *City Ry. Co.* v. *Citizens Street Ry. Co.*, 166 U. S. 557, the General Assembly authorized the in-

corporation of street railroad companies and provided that:

> "All street railroad companies which may be organized under the provisions of this Act shall first obtain the consent of the common council to the location, survey and construction of any street railroad through and across the public streets of any city before the construction of the same shall be commenced."

Pursuant to this authority a street railway was franchised to occupy the streets of Indianapolis. The court even held this authority sufficient to make a binding contract.

The syllabus reads:

> "A city ordinance granting a street railway franchise for a fixed period, with a provision that the city shall not during that time confer on any other parties any privileges which shall impair the rights and privileges thereby granted, constitutes, when accepted, a *contract* between the railroad company and the city."

Kansas decisions are a part of the contract and estop the State from denying its validity.

The contracting parties are entitled to have their contract construed and their rights measured agreeably to the statutes in force and the principles established by the decisions of that state at the time of entering upon said contract.

At the time of entering into said contract both parties, upon advice of counsel and with full knowledge of the rule of strict construction of such con-

tracts and the statutes authorizing them, and presumably familiar with the application of that rule and the principles and precedents established by the decisions of the Kansas Supreme Court and this Court, constructed the statute as authorizing the mayor and council of Kansas City to grant, on agreed terms and conditions, a franchise to construct, maintain and operate a natural gas plant and to lay and maintain mains and pipes in the streets for the purpose of furnishing to said city and its inhabitants said *natural gas*, and that nothing in the entire act prescribing limitations, restrictions and conditions upon the authority of the mayor and council with regard to *manufactured gas*, street railway, water and electric light franchises should be construed as prohibiting the mayor and council from granting said *natural gas* franchise on whatever *terms* and conditions could be reached by *agreement* between the contracting parties with the one sole limitation upon such power that such natural gas franchise should not continue for a longer period than twenty years.

Presumably, the parties contemplating contracting and expending vast sums of money knew that away back in 1860 the first Supreme Court of Kansas held that:

> "A ferry franchise is a contract between the Legislature and the grantee and his assignee which the Legislature can neither change, repeal nor impair the obligation of."
>
> *The Territory* v. *Rayburn*, 1 K. 552.

They knew that the same court in 1863 said:

> "The will of the Legislature expressed in the statute is the law and is to be ascertained by all legitimate methods of interpretation."
>
> *Jones* v. *State ex rel.*, 1 K. 273.

And that:

> "It is only when all other methods of ascertaining the legislative intention fail that a court may look to the effects of a law; then their interpretation becomes a sort of judicial legislation."
>
> *Dudley* v. *Reynolds*, 1 K. 285.

The parties also knew that:

> "Municipal corporations are creations of law and can exercise only powers conferred by law and take none by implication, and in making contracts they must act within the limits and observe the regulations prescribed, else there will be no contract."
>
> *Leavenworth* v. *Rankin*, 2 K. 357 (cited in the court's opinion below).

But they also knew that this rule was applied in a case where the mayor of Leavenworth sought by contract to bind the city at large for the cost of a special improvement which the statute expressly provided must be borne by abutting property, and in no event could ever become a charge upon the city. And they were also mindful of the fact that the proceedings relating to this same identical improvement when completed under said *ultra vires* and expressly *prohibited* contract were cured by the Legislature; that the contractor got his money, and the assessments

therefor were sustained in *Hines* v. *The City of Leavenworth*, 3 K. 186, thus showing the early policy of this state to be the enforcement rather than the repudiation of contracts made by its municipalities in good faith.

And the parties were also told that:

> "There is a difference between executed and executory contracts. A city will generally be relieved from performing an illegal or void *executory* contract before *any part* of the same has been executed; while on the other hand a city will in many cases be compelled to perform such a contract, if it has already been executed by the other party and if in *equity and good conscience, the city ought to perform it.*"
>
> *Leavenworth* v. *Laing et al.*, 6 K. 287.

They saw that in 1884 Justice Brewer held that Section 2 of the bill of rights of the Kansas Constitution reserving all policital power in the people and prohibiting irrevocable special privileges and immunities,

> "Does not inhibit the Legislature from granting to municipal corporations the power to permit railway companies to construct and operate street railways therein."
>
> *Atchison Street Ry. Co.* v. *Mo. Pacif. Ry. Co.*, 31 K. 661.

And that in that case Justice Brewer said:

> "Had the Legislature given to the city of Atchison this power? It is conceded that no *special grant of power* in this direction *had ever been made;* but the contention is that the *general control* of the streets *vested* in the corpora-

> tion was sufficient to validate its action in granting permission to plaintiff to occupy the streets with its railway. *This position, we think, must be sustained.*" P. 667.

And under authority to condemn land for water works and "to provide the city with water." Sec. 817, G. S. 1889; Sec. 60, Ch. 100, L. 1872. An irrevocable contract was authority and the power to supply water carries with it the authority "as an *incidental* power" to "permit others to use the streets for that purpose."

Wood v. *Water Works Co.*, 33 K. 597.

And it must be presumed that the contracting parties noticed that in 1886 Chief Justice Johnson, delivering the opinion of the court in *City of Wyandotte* v. *Corrigan*, 35 K. 24, said that:

> "The defendant urges that the granting of the franchise and its acceptance by the company constituted a contract within the protection of the Federal Constitution, which could not be impaired by any subsequent legislation of the city without the *assent* of the company; and he contends that no other or different conditions or burdens could be imposed than those mentioned in the ordinances, and, therefore, that the license tax could not be enforced against the company or any of its agents. *It may be conceded that the grant and its acceptance constitute a contract, the obligation of which comes within the protection invoked.*"

They observed that in 1887 an ordinance providing for lighting the streets of Winfield was held to be a contract binding in all of its parts, and that,

> "Full force and effect must be given to the entire contract, including the proviso."
>
> *City of Winfield* v. *Gas Co.*, 37 K. 24.

And that the doctrine of *bona fide* purchasers of commercial paper was applied in *Water Company* v. *Burlington*, 43 K. 725, the court holding that after service was performed:

> "The city cannot after that time and as against an innocent purchaser repudiate its agreement and refuse to pay for the rent of the hydrants merely because of the original fraud and conspiracy entered into and consummated by the original party and the city officers."

And again, in *Manly* v. *Emley*, 46 K. 655, the prospective contracting parties saw the doctrine of vested rights enforced thus:

> "In 1888 a city of the second class had the power to contract for water to be furnished to itself and its inhabitants. When a city of the second class becomes a city of the first class it retains all its *vested rights* with regard to its property and contracts, and *remains responsible with regard to all its existing liabilities and obligations, whether under contract or otherwise.*"

In that case the court held that the levy of the water works "contract tax" was valid which was provided for in an ordinance of a city of the second class and was prohibited by statute as excessive when the city became one of the first class, thus clearly showing the parties to this contract at bar that the policy of this state was to preserve inviolate contracts made by its municipalities, and it may here

also be noted that the water contract in question was made under a statute giving cities of the second class only general powers to provide for a water supply. It requires great inferences and implications to construe such power to include prohibiting the Legislature from placing a limitation upon the purely sovereign power of taxation. Under this decision the parties were certainly entitled to construe the statute in the case at bar authorizing an agreement on terms to include at least fair and reasonable rates essential to the enterprise.

The parties to this contract also were informed that in 1892 the court held that:

> "When a city * * * has entered into a contract, and a water works plant has been erected and maintained at a great expense for a period of four years or more, and during that period the corporation owning the plant has furnished water in accordance with a contract entered into and recognized by the city, and the city has levied the proper tax and paid the hydrant rental for three years, and otherwise recognized the validity of such contract; *Held*, that this Court will not hold the contract void, * * * because the city *did not possess the power* to make a contract for the period of twenty-one years. *While the city may be powerless to make a contract for the duration alleged, still the contract should be upheld for a reasonable time*, when the circumstances and conditions of the city as to population and assessed valuation are substantially the same, and no better facilities are offered upon more reasonable terms."
>
> *Water Works Co.* v. *Columbus*, 48 K. 99.

And that in the opinion the court said:

"Again, if we are to follow our *former precedents* much argument of counsel for the city is lost wherein he contends that the franchise claimed is in direct conflict with Section 2 of the bill of rights. This court has said, speaking through Mr. Justice Brewer, that the words, 'No special privileges or immunities,' refer to privileges or immunities of a political nature."

"It is conceded that the plaintiff has only been furnishing water to the city of Columbus for a period of a little more than four years, the works having been tested and accepted on the 28th day of December, 1887. So far as the plaintiff can make it the contract is an executed one; and during the period of its existence while the city used the hydrants and paid the rental it became an executed contract, so far as the city was concerned. Now, the city having by its contract and permission *invited* the expenditure of a large sum of money by the plaintiff in erecting the works in order to give the city such fire protection as it had agreed to pay for in the manner indicated in the ordinance, should not the water company be given a reasonable time in which it might have the benefits of a contract which had been agreed to and recognized? Or *shall we say that, because there was no express authority to make the contract for the period of twenty-one years, it is therefore void? To hold to the latter proposition, when the parties cannot be placed in the same condition they were in before the contract was executed, would be a violation of the plainest rules of good faith.*"

Then, after reviewing all the cases, the court said:

"Mr. Justice Valentine, in the case of *Brown v. City of Atchison*, 39 K. 54, speaking for this court after a review of the authorities upon the

question of corporate power, deduced the following principles: 'Where a contract is entered into in good faith between a corporation, *public* or private, and an individual person, and the contract *is void*, in whole or in part, because of *want of power* on the part of the corporation to make it or to enter into it, but the contract is *not immoral, inequitable or unjust*, and the contract is performed in whole or in part by and on the part of one of the parties and the other party receives benefits by reason of such performance over and above any equivalent rendered in return and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party by either rescinding the contract and *placing the other party in statu quo* or by account to the other party for all benefits received for which no equivalent has been rendered in return, and *all this should be done as nearly in accordance with the terms of the contract* as the law and equity will permit.'"

Now, the contracting parties were certainly greatly misled by this most equitable and fair statement of the law when they construed the authority "to agree on terms" to mean the authority to agree on *price*, the very essence of the agreement.

Again, in *Winfield* v. *Water Co.*, 51 K. 70, a water franchise fixing rates was held to be a valid binding contract which could not even be rescinded for gross breach in supplying the proper quality of water until fair notice and opportunity to be heard and defend had been given the water company.

But the parties to this contract were lulled into still greater assurance of their right to contract by

the construction placed upon Sec. 30, Chapter 19, G. S. 1889, reading as follows:

> "Sec. 30. The council may *procide* for and regulate the lighting of the streets and the erection of lamp posts and the numbering of the buildings in the city and the construction of sewers; and the council shall have power to make contracts with any person, company or association for such purposes; and give such person, company or association the *pricilege* of furnishing light for the streets, lanes and alleys of said city for any length of time not exceeding twenty-one years."

In construing that section the Kansas Supreme Court said:

> "It is contended that the statute should be strictly construed, and that, when so construed, it does not confer power on the city authorities to provide for lighting the streets by erecting an electric light plant at its own expense, but that it is limited to accomplishing the object by making a contract with some person, company or association to furnish lights. *The statute should receive a fair and reasonable interpretation with a view to carry out its object. It should neither be destroyed by an unreasonable strictness, nor stretched to include that which was not in the legislative mind.* * * * The word *'provide'* is sufficiently comprehensive in its ordinary signification to include a provision by purchase.
>
> "*There would be room to doubt* the power of the city authorities to enter into a continuing contract for lighting the streets for a long term of years with an individual or a corporation *if the statute did not contain express authority to do so*, and in making such contract the mayor and council would necessarily bind their successors in office by their action and compel levies of taxes through successors to

> carry out the terms of the contract. The section under consideration does not confine the mayor and council to any one particular mode of lighting the streets, nor of providing light. They are restricted, however, if the contract be let to an individual or company to a term not longer than twenty-one years. It may be as much shorter as the parties *agree on. We think if the statute were open to a double construction* it should rather be given that one most favorable to the rights of the city and its inhabitants." *State ex rel.* v. *Hiawatha*, 53 K. 478.

Here is a statute where the court might have said the phrase, "Not exceeding twenty-one years," should modify the word "privilege," and not the word "contracts" in the preceding part of the paragraph relating to sewers, etc., but the court very naturally held that the statute should not be destroyed by construction, but should be given its natural meaning, and the court very aptly says that the statute is not open to a double construction. Now, were not the parties to this contract at bar entitled to rely upon the reasonable construction placed upon this almost identical statute by that court when they entered upon this contract in good faith and expended their millions to bring and furnish natural gas to Kansas City and its inhabitants under a statute which authorized them to "*agree on terms.*"

Again, in *Watkins* v. *Glenn*, 55 K. 417, the court, speaking through Justice Horton, said that:

> "Any subsequent law of the state which so affects the remedy as substantially to impair and lessen the value of the contract is forbidden by Article 1, Section 10, of the Constitution of the United States, which ordains that no state

shall pass any law impairing the obligations of contracts."

Here is a positive declaration that there is no constitutional reservation in Kansas of power to impair municipal contracts by legislation, and that even an alteration of the remedy may be an impairment.

Again, the parties were greatly misguided by holding that where,

> "A city granted a franchise and entered into a contract with a party to construct, reconstruct, maintain, repair and operate an electric light plant for furnishing light to the city for a period of eight years at a stipulated rate, the city to make monthly payments for the light furnished, the right to rescind the contract for non-performance was not reserved to the city in the contract itself. The plant was built and operated for a long time under the contract, and then, without fault of the owner, it was partly destroyed by fire. The owner determined to rebuild the plant, and without unjustifiable delay proceeded to do so. And the city, although well aware of this fact, gave no notice of a purpose to terminate the contract until the plant was practically rebuilt. *Held*, that under the circumstances the city could not terminate the contract in that way nor by the mere repeal of the ordinance granting the franchise."

Mills v. *City of Osawatomie*, 59 K. 463.

An examination of the statute will show that this irrevocable contract was made under a statute which merely authorized the city to provide for an electric light plant to furnish light to the city and its inhabitants.

Again, the parties to this contract were greatly misled by the reassuring language of the court in a *quo warranto* suit prosecuted by the state questioning the power of a corporation furnishing water in Topeka to alienate its franchises to operate said plant and take and collect the tolls and rates fixed by the ordinance. The court in that case as late as 1900 said, after reviewing the authorities:

> "The ordinances accepted by the water company were in the nature of contracts and were property within the meaning of the law;
>
> In the making of said contracts evidenced by ordinances the city *was not exercising legislative or governmental powers, but quasi private power conferred by law and in such matters it could exercise its business affairs governed by the same rules as apply to an individual or a private corporation.*"
>
> *State* v. *Water Co.*, 61 K. 561.

In the syllabus the court said:

> "Corporations cannot sell or mortgage their franchises received from the state which confer power upon them *to exist as artificial bodies*; but those franchises denominated as secondary, which include the *privileges granted by a city to a water company with the right to take tolls*, etc., *may under our statute be lawfully alienated or incumbered.*"

And the parties observed that in 1872 the Legislature provided that:

> "The council may *provide* for and *regulate* the lighting of the streets and the erection of lamp posts, and the council shall have power to make contracts with and authorize any person,

> company or association to erect gas works in said city, and *give* such person, company or association the exclusive privilege of furnishing gas to light the streets, lanes and alleys of said city for any length of time not exceeding twenty-one years."
>
> Sec. 59, Ch. 100, Laws 1872.

And that in this section the power to "*regulate*" seemed to be reserved and the twenty-one-year limitation clause seemed to modify the verb "to give" the "exclusive privilege," and that it does not modify the power to contract, and that no express power to contract or agree on terms for any definite period of time is granted. Yet in *Baxter Springs* v. *Light Co.*, 64 K. 591, the court held that:

> "An ordinance of a city, duly passed and published, conferring certain privileges and imposing certain duties upon an electric light company which, under the charter of the city it had the power to confer (only by virtue of the section above quoted), the terms of which ordinance were accepted by the company as therein provided, *constitute a contract between the city and such company, binding upon both.*"

In the opinion they also observed that:

> "A contract good enough to obtain benefits under is good enough to warrant a recovery of payment for such benefits. * * * *This rule of ordinary morals applies as strongly to a municipality as to an individual.*"

And they naturally concluded that it becometh the sovereign state better than its slave, the city.

But, if the contracting parties ever had any doubt about the power of Kansas City to make this contract, or saw any ambiguity, or imagined any concealed or latent infirmity in said statute, or if, as a matter of fact, the power was "balanced in doubt," that doubt vanished when they saw the construction and interpretation placed upon the decisions of the Supreme Court of Kansas as to such municipal contracts, laid down by the United States Circuit Court of Appeals in 1896 in *Bank* v. *Arkansas City*, 76 Fed. 271, in which the court said:

> "May a municipality obtain and accept the use of expensive water works under a contract by which it covenants to pay annual rentals therefor and to grant an exclusive privilege to use its streets for that purpose and escape the performance of *all its covenants* because it was *beyond its power* to make the privilege which it granted exclusive? This is the first question in this case. Paragraph 7185, G. S. 1889, which was in force when the contract here in question was made, provided:
>
> 'That cities of the first, second and third class of the state of Kansas are hereby granted full power and authority on behalf of such cities respectively to contract for and procure water works to be constructed for the purpose of supplying the inhabitants of such cities with water for domestic use, the extinguishment of fires and for manufacturing, and for other purposes.'"
>
> "*It is settled by repeated decisions of the highest judicial tribunal of the state of Kansas that under* this and other sections of the statutes of that state a city of the second class has authority to grant a franchise to a person or a corporation to establish water works to furnish the city and its inhabitants with water, to grant the privilege of using its streets to a private

corporation for such a purpose, and to agree to pay a rental to it for the use of its hydrants. Gen. St. Kan. 1889, pars. 878, 817, 1401, 1402, 7185-7190; *Wood* v. *Waterworks Co.*, 33 Kan. 590, 7 Pac. 233; *Burlington Waterworks Co.* v. *City of Burlington*, 43 Kan. 725, 23 Pac. 1068; *Columbus Waterworks Co.* v. *City of Columbus*, 46 Kan. 666, 26 Pac. 1046; *Manley* v. *Emlen*, 46 Kan. 655, 27 Pac. 844; *Columbus Waterworks Co.* v. *City of Columbus*, 48 Kan. 99, 101, 28 Pac. 1097, 1098. *These decisions conclude this question here.* When no question of general or commercial law, and no question of right under the Constitution and laws of the nation, are involved, the Federal courts uniformly follow the construction of the Constitution and laws of a state given by its highest judicial tribunal. This rule is adhered to with marked tenacity in the construction of state statutes, which measure the powers and liabilities of political and municipal organizations of a state. *Madden* v. *County of Lancaster*, 27 U. S. App. 528, 536, 12 C. C. A. 566, 570, and 65 Fed. 188, 192, and cases cited; *Detroit* v. *Osborne*, 135 U. S. 492, 499, 10 Sup. Ct. 1012, 1013."

"But it is insisted that this contract is beyond the powers of the city and void, because it grants the right to use the streets of the city to the water company, and promises to pay rental for the hydrants, for twenty-one years. The proposition on which this contention rests is that the members of the city council are trustees for the public, that they exercise legislative powers, and that they can make no grant and conclude no contract which will bind the city beyond the terms of their offices, because such action would circumscribe the legislative powers of their successors, and deprive them of the right to their unrestricted exercise as the exigencies of the times might demand. There are two reasons why this proposition cannot be successfully maintained in this case:

First, it ignores the *settled distinction between the governmental or public, and the proprietary, or business, powers of a municipality*, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; *the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality.* In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive officers unimpaired. *But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation.* Dill Mun. Corp., (3d Ed.) Sec. 66, and cases cited in the note; *Safety Insulated Wire & Cable Co.* v. *City of Baltimore*, 13 C. C. A. 375, 377, 378, 66 Fed. 140, 143, 144; *San Francisco Gas Co.* v. *City of San Francisco*, 9 Cal. 453, 468, 469; *Com.* v. *City of Philadelphia*, 132 Pa. St. 288, 19 Atl. 136; *New Orleans Gaslight Co.* v. *City of New Orleans*, 42 La. Ann. 188, 192, 7 South. 559, 560; *Tacoma Hotel Co.* v. *Tacoma Light & Water Co.*, 3 Washington State 316, 325, 28 Pac. 516, 519; *Wagner* v. *City of Rock Island*, 146 Ill. 139, 154, 155, 34 N. E. 545, 548, 549; *City of Vincennes* v. *Citizens Gaslight Co.*, 132 Ind. 114, 126, 31 N. E. 573, 577; *City of Indianapolis* v. *Indianapolis Gaslight & Coke Co.*, 66 Ind. 396, 403; *Read* v. *Atlantic City*, 49 N. J. Law 558, 562, 9 Atl. 759. *In contracting for waterworks to supply itself and its inhabitants with*

water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Cor., Sec. 27; *City of Cincinnati* v. *Cameron*, 33 Ohio St. 336, 367; *Safety Insulated Wire & Cable Co.* v. *City of Baltimore*, *supra*, and cases cited under it.

Second. The powers granted to this city by the Legislature of the State of Kansas to contract for and procure water works are plenary and unlimited save by the duty to exercise them with reasonable discretion, and *it is not the province of a court to contract or clip the legislative grant.* The words are, 'full power and authority to contract for and procure water works to be constructed for the purpose of supplying the inhabitants of such cities with water.' It cannot but be clear to all who are familiar with the condition of cities of the second class—cities whose population was between 2,000 and 15,000—in the state of Kansas, in 1872, when this grant was made, that it was not the intention of the Legislature of that state to limit the terms of these contracts to the single year during which the terms of office of the members of the city councils continued. The cities were young and poor, but they were ambitious and sanguine. They did not have the ready money to construct the water works which the health and comfort of their inhabitants required *It is hardly possible that any individual or corporation could have been induced to expend the thousands of dollars required to construct such works as have been built in this city in consideration of the right to use the streets of the city for that purpose, and of the promise of rental for its hydrants for the limited term of a single year. These facts the members of the Legislature must have known, and they undoubtedly granted this plenary power to contract for the very purpose of enabling the cities to procure a*

supply of water for their inhabitants by grants of privileges to private parties to use their streets for that purpose for a reasonable term of years, and by covenants to pay rentals for hydrants for a like term. In any event, the Legislature made this grant, and it thereby vested in the mayor and council of the city the right *to make such contracts for such terms as in their discretion they thought proper.* There is nothing in this record to show that the mayor and city council of Arkansas City either exceeded their authority or abused the discretion which the Legislature gave them when they fixed the term of the contract in this case at twenty-one years. Ample power was granted to cities of the second class of the state of Kansas by Section 7185, Gen. St. Kan. 1889, to grant the right of the use of their streets to lay water pipes and to pay hydrant rentals for reasonable terms longer than the year during which their mayors and councilmen held their offices, and there is nothing in this regard to show that twenty-one years was an unreasonable time for the term of such a contract."

"*Wood* v. *Waterworks Co.*, 33 Kan. 590, 597, 7 Pac. 233, 238.

Burlington Waterworks Co. v. *City of Burlington*, 43 Kan. 725, 728, 23 Pac. 1068, 1069.

Manley v. *Emlen*, 46 Kan. 655, 27 Pac. 841.

Columbus Waterworks Co. v. *City of Columbus*, 46 Kan. 666, 26 Pac. 1046.

Columbus Waterworks Co. v. *City of Columbus*, 48 Kan. 99, 113, 28 Pac. 1097, 1102.

Atlantic City Waterworks Co. v. *Atlantic City*, 48 N. J. Law 378, 6 Atl. 24.

Fergus Falls Water Co. v. *City of Fergus Falls*, 65 Fed. 586, 591.

Long v. *City of Duluth*, 49 Minn. 280, 51 N. W. 913.

Walla Walla Water Co. v. *City of Walla Walla*, 60 Fed. 957, 960.

City of Indianapolis v. *Indianapolis Gaslight & Coke Co.*, 66 Ind. 396, 407.
City of Vincennes v. *Citizens' Gaslight Co.*, 132 Ind. 114, 124, 125, 31 N. E. 573."

"If, upon general principles, there was any doubt that the defenses of ultra vires, which have been considered, could not be maintained in this suit, the repeated decisions of the highest judicial tribunal of the state of Kansas upon these questions would compel that conclusion."

Here the Court of Appeals reviews all the Kansas decisions and concludes:

"The result is that the city of Arkansas City made an irrevocable contract with the Interstate Gas Company, the terms of which are evidenced by Ordinance No. 27, and that none of the provisions of that contract which are in question in this suit are invalid on the ground that the city exceeded its powers in making the contract."

"The Ordinance No. 304, by which the city in terms repealed Ordinance No. 27, on which the contract for the water works was founded, was, of course, void as against the trustee and the bondholders, because it impaired the obligation of a contract."

In *Wyandotte County Gas Company* v. *Commissioners*, 83 K. 195, the very contract sought to be impaired and ignored by the state in this case was held by the Supreme Court of said state to be an irrevocable contract. The court said:

"The corporation (The Wyandotte County Gas Co.) holds franchises which *constitute property of which it cannot be deprived without due process of law. Ordinarily franchise-ordinances constitute contracts, the obligation of which can-*

not be impaired. Franchises like those the plaintiff enjoys may be bought and sold for a price in money. The plaintiff bought them, and they constitute an asset which contributes to the value of its capital stock."

The binding force and effect of such municipal franchise-contracts has been too often recognized and enforced by the Kansas Supreme Court to be open to question at this time.

Water Works Co. v. *City of Columbus*, 16 K. 666.
City of Potwin Place v. *Topeka Rg. Co.*, 51 K. 609.
Street Rg. Co. v. *Nave*, 38 K. 744.
Kansas City v. *Gas Co.*, 9 K. App. 325.
Water Works Co. v. *City of Columbus*, 18 K. 99.
Baxter Springs v. *Light & Power Co.*, 64 K. 591.
Water Co. v. *Galena*, 74 K. 644.
Brown v. *Atchison*, 39 K. 37.

The Statute Conferring Authority.

With all the foregoing principles established by this long line of precedents and the repeated application of fair and reasonable rules of construction by our own Supreme Court and the construction and interpretation of these decisions by the Federal Court, and the unbroken chain of decisions of the United States Supreme Court, the parties to this contract, in all good faith and reliance upon said principles, precedents and rules of construction sought to know the authority of Kansas City conferred by Chapter 122, Laws of 1903. (Appendix.)

In examining that chapter they found the title, "An Act relating to cities of the first class," comprehensive enough under the constitutional requirement to cover any power conferred. In Section 3 they found that, "Every city governed by the provisions of this Act shall be a body *corporate* and politic," thus vesting in said city corporate or private business functions as well as public, governmental or administration powers; and on referring to the decisions of the Kansas court they found that, in making contracts for public utilities, "the city was not exercising legislative or governmental powers, but *quasi* private power conferred by law, and in such matters the council exercised its business affairs governed by the same rules as applied to an individual or private corporation." *State* v. *Water Co.*, 61 K. 561; *Baxter Springs* v. *Light Co.*, 64 K. 598; *Bank* v. *Arkansas City*, 76 Fed. 271. And that there is "a settled distinction between the govern-

mental or public and the proprietary or business powers of a municipality." *Bank* v. *Arkansas City*, 76 Fed. 282.

And in the said Sec. 3, following this grant of "corporate existence," the parties found that such city "*shall have power to make all contracts*, and do all other acts in relation to the property and *concerns* of the city necessary to the exercise of its *corporate* and *administrative* powers." They reasoned in the light of the foregoing decisions that the city was here given power to contract so far as "*necessary*" in the exercise of either its corporate business and administrative governmental powers in getting this natural gas supply. They knew that the supply of natural gas was certainly one of the great "concerns" of Kansas City at that time, and whether it was a corporate or a governmental function there was certainly express power to contract therefor if necessary.

But, after running through the entire Act, examining it section by section, and observing that there were many limitations and restrictions upon this broad grant of power to contract, with reference to certain named public utilities, to-wit, water works, street railways, electric lighting and manufactured gas, they found the most natural thing in Sec. 170a, *viz.*, that none of the restrictions, limitations, conditions and handicaps upon the aforesaid power to contract with reference to these old and established public utilities should apply to a *natural gas* utility, for the very apparent reason that natural gas had just made its advent and the fondest hopes of the denizens of this city was to acquire it for domestic use on any terms that might be agreed to. Where-

fore, the Legislature provided in said Sec. 170a that (transposing the section to conform to the state court's opinion and its setting with the preceding sections of the Act):

"Nothing in this *Act*" shall be construed as prohibiting any city governed and controlled by the provisions of this Act from granting a franchise to construct, maintain and operate a *natural gas* plant and to lay and maintain all necessary mains and pipes in the streets for the purpose of furnishing said city and its inhabitants natural gas on such terms and conditions as may be agreed to, and the mayor and council of any such city are hereby authorized to grant such franchise to construct, maintain and operate said natural gas plant and to lay and maintain all necessary mains and pipes in the streets, provided that such franchise shall not continue for a longer period than twenty years.

In logical sequence the clause, "Nothing in this Act," etc., modifies, limits and excepts from the provisions of the entire *Act* all these conditions and limitations prescribed therein as to manufactured gas and other public utilities; and the present participle, "granting," and the infinitive participle, "to grant," are both modified and limited by the adverbial clause, "on agreed terms and conditions." There is no escaping the grammatical and logical construction of this language, and conceding the construction of the court below, that the past participial adverb, "provided," and the clause following it modifies and limits the adverbial infinitives, "to construct, maintain and operate" and "to lay and maintain pipes," yet this very construction of the court leaves "the power to grant" modified and limited only by the ad-

verbial phrase, "on such terms and conditions as may be agreed to."

The subject of the sentence is, "mayor and council"; the predicate, "are authorized." Are authorized to what? "To grant." The infinitive "to grant" modifying the predicate "are authorized." To grant what? A franchise. The word "franchise" being the object of the infinitive "to grant." To grant how or in what manner? "On terms." What kind of terms? "Agreed terms." There is only one clause in the entire section which indicates the manner in which this authority "to grant" shall be exercised, and that clause is "on agreed terms and conditions," which is in law, in fact, and in legal effect by contract. There is no escaping this construction.

Unlike the Freeport case, where the authority conferred was "to fix by ordinance," to command, to legislate; the authority here delegated was to "agree"—to contract.

Certainly the city had some power under this section to contract, to agree to something, and under Sec. 3 it had express power "to contract" on all "concerns" of the city. Now, if the parties had authority to agree on terms and conditions, the sole question confronting them was to what extent they could go in their agreement. There is no limitation prescribed in the statute. It is pertinent to note that they had power to agree, both as to terms and as to conditions of the grant. These two words were certainly not used by the legislature as synonymous; the conditions were to be imposed upon the right of the grantee to exercise the franchises granted, namely, to occupy the streets, to maintain a gas plant and to collect rates. These were the conditions

which the city had a right to impose upon and require of the grantee, and the grantee was entitled upon the performance of those conditions to exact and receive the "terms" which the city was authorized to agree to. Now, what terms could the city agree to, except the matter of price?

Turning to Ordinance 6051, we find that it is divided into two parts, Sections 1 to 7, inclusive, constitute what is offered, given, agreed to and granted by the city, among which are the rates to be charged. Section 8 consists of 14 separately numbered paragraphs, all of which are the "*conditions*" upon which the rights granted and agreed to in the first seven sections may be exercised. This Section 8 starts out by saying:

"The rights, privileges and franchises herein granted are for the following *considerations* and upon the following *conditions*, to-wit:" (Or. 58, pt. 36.)

The first condition is that twenty-five miles of mains shall be supplying natural gas within one year and others laid from time to time by order of the mayor and council.

The second condition is that the grantee shall pay two per cent of its gross receipts into the city treasury and make certain reports. (Or. 58, pt. 36.)

The third condition is that the grantee shall construct and maintain a 750,000 cubic foot gas holder.

The fourth condition is that the grantee shall extend its mains 100 feet for one consumer.

The fifth condition is that the pipes and mains shall be laid under the supervision of the city engineer so as not to obstruct public travel.

The sixth condition is that the grantee shall pay $100 bridge rental for each city bridge used.

The seventh condition is that the grantee shall maintain $1,000 on deposit to guarantee repairs of the streets.

The eighth condition is that the grantee shall put up a $25,000 cash bond and a $100,000 surety bond to guarantee performance of said contract.

The ninth condition is that the grantee shall not sell its franchise, plant or property to a foreign corporation, but shall organize a domestic corporation to operate the same.

The tenth condition is that the grantee shall run service mains to the lot lines and furnish meters free of charge.

The eleventh condition is that the franchise may be forfeited for breach or non-performance.

The twelfth condition is that the grantee shall file a written acceptance of the "*terms*, obligations and conditions." (Or. 62, pt. 39.)

The thirteenth condition is that free gas shall be furnished to city buildings and public libraries, etc.

The fourteenth condition is that if Kansas City, Missouri, shall obtain gas from the companies furnishing natural gas there at a lower rate than the rates fixed in this ordinance, the Kansas City, Missouri, rates shall control.

These are the "*conditions*" imposed by the city upon the company which it was authorized to agree to, and which it would now reluctantly relinquish and all of which the record shows have been fully performed by grantee and plaintiff in error.

Now, what were the "*terms*" which the city could "*agree to?*"

Sec. 1 embraces the franchise to occupy the public ways of the city which the city was authorized "*to grant.*"

Sec. 2, the privilege to maintain and operate the gas plant within the corporation city.

Sec. 3 provides that "the grantee, its successors and assigns, shall be *entitled* to charge and collect from consumers of such gas during the period of two years from and after natural gas is first furnished hereunder, at the rate of not to exceed twenty-five (25) cents per thousand cubic feet, and during the period of one year, next thereafter at the rate of not to exceed twenty-eight (28) cents per thousand cubic feet, and during the period of one year next thereafter at the rate of not to exceed twenty-nine (29) cents per thousand cubic feet, and during the period of one year next thereafter at the rate of not to exceed thirty (30) cents per thousand cubic feet, and thereafter during the period of the aforesaid grant, at the rate of not to exceed thirty-five (35) cents per thousand cubic feet." (Or. 55, pt. 34.)

Now, suppose there was no authority contained in Section 170a to make this agreement, yet we find that by Sec. 3 of the same act the city, "Shall have power * * * to make all contracts * * * in relation to the * * * *concerns* of the city necessary to the exercise of its corporation and administrative powers."

Assuming that the city had by virtue of Sec. 170a only power to grant naked street rights, yet it was absolutely necessary to the exercise of this corporate or administrative governmental function, as the case may be, to agree upon the price of this gas in order to obtain it at all. There is no escap-

ing the conclusion that an agreement as to price was an absolute necessity in order to acquire this cheap and desired fuel. It was of the essence of the agreement or contract. It required the expenditure of millions of money in new and additional distributing mains and pipes, pipe-line facilities, compressors, stations, leases and contracts for natural gas in order to supply Kansas City; and even if there were nothing in Sec. 170a authorizing the mayor and council "to agree on terms," including price, the power conferred by Sec. 3 above quoted, to make all contracts in relation to the concerns of the city was ample and sufficient to authorize the contract in question.

In the opinion, the state court cites Sec. 51, Chap. 122, Laws of 1903, as the statute, "Upon which reliance is placed as granting authority to the city to contract with appellant." The court is certainly mistaken by inferring that this is the section on which plaintiff in error relies for authority, for this section names specifically water, electric light, heat, power, gas, telephone service, or any other commodity, and there is no hint of authority to agree or to *contract* in this section; but merely the "power to *enact ordinances* for all the purposes named" (Sec. 21, Appendix), but this power to enact ordinances and to repeal the same contained in Secs. 21 and 51 is limited, restricted and modified by Sec. 170a providing that, "Nothing in the *Act* shall be construed as prohibiting any city governed and controlled by the provisions of this Act from granting * * * a franchise * * * for natural gas * * * on such terms and conditions as may be agreed to * * *."

Again, the court cites Sec. 170, where it is provided that, "That mayor and council of any such city shall at all times during the existence of *such* grant, contract or privilege have the right by ordinance to fix a reasonable schedule of maximum rates." Now, what franchise is referred to by the word "such"? Certainly it is the franchise under discussion in Secs. 170, 169 and 168, and on examining those sections we find that, "The municipal authorities of any city, governed and controlled by the provisions of this act, may permit any person, company or corporation *to manufacture*, sell and furnish gas light, electric light, power or heat to any city, etc." (Sec. 139, Appendix.) Certainly, the word "such" qualifies and limits the class of franchises concerning which the mayor and council shall reserve power to regulate rates to the class named, to-wit, the *manufactured gas* franchise, and all this becomes more plain, apparent, clear and unanswerable when we find in the next section, 170a, that, "Nothing in this *act*," which includes this reservation quoted by the court, "shall be construed as prohibiting any city * * * from granting * * * a franchise * * * for natural gas * * * on such terms and conditions as may be agreed to."

In the opinion the court says that, "If Sec. 51 shall be construed as granting to the city power to fix, once for all, the rates during the existence of the grant this provision—that the city shall at all times have such power—would be meaningless."

We submit that this section has and retains its full and complete meaning by reference to the class of franchises named and under discussion, to-wit, manufactured gas, electric light, and street railway

franchises, and that to extend this class to include *natural gas* franchises renders the provisions that, nothing in this act shall be construed as prohibiting the city from granting a franchise for natural gas on such terms and conditions as may be agreed to wholly nugatory and meaningless. The sections must be construed together and each given its proper meaning.

If the court's conclusion is correct that Sec. 51 is the authority for granting the franchise at bar, and that Sec. 170 is applicable to said franchise and reserves in the city the power to regulate rates under a natural gas grant, then it follows that Sec. 170a is an idle repetition of the same authority, for it is clear and not controverted that the mayor and council are thereby authorized to grant a franchise to construct, maintain and operate a natural gas plant and to lay and maintain mains and pipes in the streets for the purpose of furnishing natural gas, which power the court holds was also duly conferred by Sec. 51. This section must have an independent meaning of its own, a purpose to accomplish, and that meaning and purpose was to cover the subject-matter of *natural gas* grants, and to remove the numerous limitations and handicaps upon other utility grants by authorizing an *agreement on terms;* the exigencies of the case and the demands of the city for natural gas prompted such action and justified such delegation of authority. If this is not the intent of the section and the act, then we must attribute to the legislature the folly of chanting over to itself as in a trance the authority already conferred upon the city. This we can not do under the re-

peated decisions of this court and the courts of Kansas.

The franchise given embraced but three rights, viz., to operate a plant, to use the streets and to collect rates; of these the first two were burdens or obligations undertaken; the last, "to collect rates," is the only real substantial right conferred. Certainly the Legislature could not object to the Company being bound for centuries to carry the burdens, do the work and render the service; the only *right* which should be restricted in point of time is the right to collect a definite rate.

Again, a most pertinent inquiry, reflecting upon the construction of this section, is, why the limiting a natural gas grant to twenty years, when authority was delegated to grant to all other old established utilities exactly the same franchise to street rights for a period of thirty years? To propound the question is to answer it. No authority was given to fix rates by contract with these other utilities. In Secs. 51, 64, 169 and 170 of the Act the bare, naked authority to grant the use of the streets was given and the express power to regulate rates during such grants was reserved, while in Sec. 170a, relating to natural gas grants, the authority was delegated to bind the city and the *state* by an irrevocable contract guaranteed under the Federal Constitution, and the Legislature very wisely and properly limited the term of such grant embodying such a contract to a much shorter period of time.

Again, the company already had a 30-year street-rights grant and there was no reason or excuse for another grant of the same rights. (Or. 56, pt. 35.) The object to be accomplished was to procure in the

first instance a natural gas supply for said city and its people.

We again revert to the rule of strict construction to which we all subscribe, that all ambiguity must be resolved against the city's right to contract, and if its authority is "balanced in doubt," such doubt must be resolved in favor of the state, but "it is not the province of the court to contract or clip the legislative grant." *Bank* v. *Arkansas City*, 76 Fed. 282. And the "balanced doubt" should not arise in the mind of this court from the mere denial of such power by the state nor from the judgment of the court below, but the rule adopted by Chief Justice White should apply, to-wit:

> "The rule then to be applied when the matter is *balanced in doubt* is this and nothing more, that if in using its independent judgment as it is its duty to do a *serious doubt arises* in the mind of the court, then the interpretation by the state court acting upon a *serious* doubt created by the existence of independent judgment, will cause such judgment to *preponderate* in favor of the construction given by the state court to its own statute."
>
> *Water Co.* v. *Freeport*, 180 U. S. 587.

In other words, the doubt must be a real, genuine, honest, question, and not one arising from the mere denial of power.

The state court cites the Freeport case as authority for the construction given the Kansas statute. Chief Justice White delivered a most scathing dissenting opinion in that case in which three of his associates, Justices Brewer, Brown and Peckham, concurred. The Supreme Court, and no other court, except the Kansas Court in this case, to our knowl-

edge, has cited it as authority, except in construing the same identical Illinois statute in the Rogers Park Water Company case, in which the same justices again dissented. The Freeport case was again referred to and greatly limited, if not in fact reversed, by this Court, in *Vicksburg Water Co.*, 206 U. S. 496, in which this Court said:

> "In the latter (Freeport) case this Court following the construction of the Supreme Court of Illinois held that where a city council was authorized to contract with any person or corporation to construct and maintain waterworks at such rate as may be fixed by ordinance for a period not exceeding thirty years, the words 'fixed by ordinance' being capable of application so as to make one ordinance endure for the period of thirty years for which the contract was made, or to give the right to pass ordinances from time to time regulating rates, the latter construction was adopted."

In the case at bar no authority was given "to fix rates by ordinance," but the authority was given "*to agree on terms.*" The distinction is apparent, all important and controlling—one was authority to legislate, to command; the other authority to agree, to contract—but aside from this construction condemned by four out of nine of the Supreme Justices, there were ample reasons for the holding in the Freeport case which are wholly wanting in this case. The parties to the contract in that case were bound at their peril to know the ruling in the Danville case and other decisions of the Supreme Court of Illinois, to the effect that under the incorporation act of that state the state itself reserved the power to regulate rates of public utilities, while in the case at bar the unbroken chain of decisions of the Kan-

sas courts has been that there is no such reservation or constitutional limitation upon the power of the legislature to delegate authority to make an irrevocable contract, even the holding of the court in this case is that an irrevocable contract may be and was authorized in the Rosedale franchise. (Or. 85 and 96, pt. 54 and 60.) The contracting parties in the Illinois case could not complain for, "the obligations of the charter of a water company are not unconstitutionally impaired by construing the charter in the light of the statute law and the *decisions* of the courts at the time the charter was granted."

Consumers Co. v. *Hatch*, 224 U. S. 148.

This is the very rule we ask to be applied to the State of Kansas in the case at bar.

The case of *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U. S. 649, decided at the October term, 1911, gives a clear view of the right rule of construction applicable to the case at bar. In that case the Legislature created a corporation and empowered it to construct, maintain and operate telephone and telegraph lines and to use the streets of cities *with the consent of the city authorities.*

This Court said:

> "In 1886, when the Ohio Valley Telephone Company was chartered, the Legislature not only had the sole right to create corporations and to grant franchises, but, *without municipal consent*, it could have authorized the company to use any and all streets of the city of Louisville. Instead, however, of exercising this plenary power, the charter declared that the company might maintain its telephone system, erect poles and string wires over the streets and highways of the city, *with and by the con-*

sent of the general council. These provisions of the charter gave the municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept; in which event the franchise granted by the state would have been nugatory. But when the assent was given, the condition precedent had been performed, the franchise was perfected, and could not thereafter be abrogated by municipal action. For, while the city was given the authority to consent, the statute did not confer upon it the power to withdraw that consent, and no attempt was made to reserve such a right in the collateral contract contained in those provisions of the ordinance relating to the company's giving a bond and carrying the police and fire wires free of charge. If those or other terms of this independent and separate contract had been broken by the Ohio Valley Company or its successors, the city would have had its cause of action. But the municipality could not by an ordinance impair that contract nor revoke the rights conferred. Those charter franchises had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the state of Kentucky. Such franchises granted by the Legislature could not, of course, be repealed, nullified or forfeited by any ordinance of a general council."

As in that case the State of Kansas in 1903 had plenary power to agree on terms for twenty years including rates for Kansas City, Kansas, but it saw fit to delegate to its agent, Kansas City, Kansas, such power which, when acted upon and accepted by the Company, became a contract binding upon the State.

The city could have imposed any terms it saw fit at the time of making this contract, "terms which the company might have been unable or unwilling to accept," and in the case at bar, as in that case, the city was authorized to agree but not to *withdraw that agreement*, "while the city was given the authority to consent, the statute did not confer upon it the power to *withdraw that consent*, and no attempt was made to *reserve* such a right in the contract."

Act of 1911 Is Void for Excessive Penalties.

The holding and judgment of the state court in this case is a finding that plaintiff in error and its officers are guilty of manifold criminal offenses and subject to innumerable minimum fines of $100 each, aggregating many thousands of dollars, under Secs. 20, 30 and 38 of said Public Utilities Act of 1911, because it followed the apparently well-established law and rules of construction of statutes of said state.

The imposition of such enormous fines and penalties in rate-regulatority Acts has been quite recently held by this Court to be a denial of due process of law, contrary to the 14th Amendment to the Federal Constitution.

Missouri P. R. Co. v. *Tucker*, 33 Sup. Ct. Rep. 961.

Wherefore, Plaintiff in error respectfully submits that Ordinance No. 6051 of Kansas City, Kansas, and its acceptance constitutes a contract between plaintiff in error and the State of Kansas duly authorized by the Acts of the Legislature of said State; that the practical interpretation of said statutes by the parties thereto and by the State for over seven years, and the construction of said contract and the statutes authorizing the same and similar Acts of said State by the highest judicial tribunal thereof estop and bar the defendant in error from now denying the authority on the part of Kansas City, Kansas, to enter into said contract; that said Act of the Legislature of 1911 prohibiting the plaintiff in error from charging the schedule of rates fixed in said contract or any rate other than those collected on the 1st day of November, 1911, is a direct impairment of said contract and contravenes Art. 1, Sec. 10, of the Federal Constitution; that the enormous fines and penalties imposed in said Act take the property of plaintiff in error without compensation and due process of law in contravention of the 5th and 14th Amendments to the Federal Constitution; and that said judgment of the Supreme Court of the State of Kansas, enjoining the plaintiff in error from collecting said schedule of rates fixed in said contract, should be by this Honorable Court reversed and set aside, and said case remanded with instructions to render judgment for plaintiff in error.

J. W. DANA,
Solicitor for Plaintiff in Error.

W. F. DOUTHIRT,
Of Counsel.

J. W. Dana

APPENDIX

FIRST CLASS CITY ACT.

An Act relating to cities of the first class, and repealing chapter 37 of the Laws of 1881 and all acts amendatory and supplemental thereto, and chapter 82, Laws of 1897, and all acts amendatory and supplemental thereto, in so far as the same relate to cities of the first class.

ARTICLE I.—GENERAL PROVISIONS.

*734. G. S. 1905. Government. Sec. 2. †All cities of the first class shall be governed by the provisions of this act.

735. Body Corporate. Sec. 3. Each city governed by the provisions of this act shall be a body corporate and politic and shall have power—

First. To sue and be sued.

Second. To purchase or receive, by bequest or gift, and hold, real and personal property for the ues of the city.

Third. To sell and convey any real or personal estate owned by the city, and make such order respecting the same as may be deemed conducive to the interests of the city, and to provide for the improvement, regulation and government of the same.

Fourth. *To make all contracts and do all other acts* in relation to the property and concerns of the city *necessary to the exercise of its corporate or administrative powers.*

*Reference to section numbers of General Statutes of 1905.
†Reference to section numbers of Chapter 122, Session Laws 1903.

Fifth. To exercise such other and further powers as may be conferred by law.

737. Powers, how exercised. Sec. 5. The powers hereby granted shall be exercised by the mayor and council of such city as hereinafter set forth.

Article IV.—Legislative Department.

Powers of the Mayor and Council.

754. Powers. Sec. 21. The mayor and council shall have the care, management and control of the city and its property and finances; and shall have power to enact ordinances for the purpose named and provided for in this article not repugnant to the constitution and laws of this state, and to alter, amend, modify and repeal such ordinances.

756. Lights. Sec. 23. To provide for lighting the streets and the erection of lamp-posts.

759. Billboards. Sec. 26. To regulate the construction and location of billboards, signs, and other appliances, on public streets and property adjacent thereto.

765. Travelers. Sec. 32. To adopt all such measures as may be necessary for the protection of strangers and the traveling public in person and property.

766. Transportation. Sec. 33. To fix the rate of carriage of persons, and drayage, carriage and transportation, of property, other than by railroads operated by steam.

776. Police Regulations. Sec. 43. To make all needful police regulations necessary for the preservation of good order and the peace of the city, and to prevent injury to or the destruction of or interference with public or private property.

784. Rates for Water, Light, etc. Sec. 51. To prescribe and fix maximum rates and charges, and regulate the collection of the same, for all water, electric light, heat, power, gas, telephone service or any other commodity or service furnished to such city or to any of the inhabitants thereof by any person or corporation now authorized by such city by

virtue of a franchise ordinance, or that may hereafter be authorized by virtue of a franchise ordinance to furnish water, electric light, heat, power, gas or telephone service, or any other commodity or service, to such city or to its inhabitants. The rates and charges so prescribed shall at all times be reasonable and just; and if any city shall fix unreasonable and unjust rates and charges, the same may, at the instance of any producer or consumer, be reviewed and determined by the district court of the county in which such city is situated.

786. Poles. Sec. 53. To grant the right of way for the erection of telephone, telegraph or electric-light poles and wires along and upon the streets, alleys and public grounds of the city, and change, modify and regulate the same; and may require any cables or wires now or that may be hereafter strung or erected to be placed underground.

787. Conduit and Pipes. Sec. 54. To grant to any person or corporation the use of the streets, alleys or public grounds for the purpose of laying water-, steam- or gas-pipes, or conduits for electric light or power, telegraph, telephone, or other use, to be used in furnishing or supplying such city and its inhabitants with water, light, heat or power, and grant permits or make contracts with persons or corporations to mine coal, oil or gas within the limits of said city, under such restrictions as shall protect public and private property and insure proper remuneration of such grants. Provided, That no franchise, right of way or privilege of any character whatever shall be granted for a longer period than thirty years.

793. Constructions in Streets. Sec. 60. To require and regulate the building of bulkheads, cellar and basement ways, stairways, railings, windows and doorways, awnings, hitching-posts, and all other structures or projections projecting upon, over or adjoining the street or sidewalk, and all excavations through or under the sidewalks in the city; and provide that no person or corporation that now has, or that may hereafter acquire, the right to lay mains, pipes or conduits in the streets, alleys or public grounds for any purpose shall make any ex-

cavation in any street, alley or public ground that has been paved or to fill the same, except in conformity with the rules and regulations established, or that may be hereafter established, therefor by ordinance.

797. Vacate street, etc. Sec. 64. To vacate and close any street or alley or portion thereof. * * *

Article IX.—Public Utilities.

902. Franchise; water rates; contract. Sec. 167. As a condition precedent for the renewal or extension of a contract or franchise now in existence, or for the granting of any original franchise or entering into an original contract by any such city with any person, company or corporation, an ordinance shall be passed by the mayor and council, which shall state the terms, conditions and consideration of such grant, contract, and franchise, which shall also provide and require that such person, company or corporation shall, during the continuance of such franchise and contract, furnish free from fire hydrants all the water that it may require for flushing of gutters and sewers and other reasonable public uses, except for fire protection; and the said city and such person, company or corporation may enter into a contract determining the price of each hydrant per annum which the said city shall pay as consideration for fire protection. Where any part or portion of the plant of such person, company or corporation, such as pipes, mains, aqueducts and reservoirs, is located beyond the limits of the city and used in connection with the supplying of water to the inhabitants thereof, the same shall be held and construed to be within the corporate limits of such city for the purpose of taxation; and every contract or franchise entered into or granted by said city to any person, company or corporation shall contain an obligation on the part of such person, company or corporation that the contract or franchise is accepted upon the terms and conditions that the said plant, with all its pipes, mains, stations and

reservoirs, whether within or without the limits of the city, shall for the purposes of taxation be held and construed to be within the limits of the city. Provided further, As further consideration for such contract, grant or franchise, the person, company or corporation to whom the same is given or granted shall be obligated and bound by the terms of the contract to pay to such city on the 1st day of January and July each year, during the existence of such contract or franchise, ten per cent of its net earnings over and above eight per cent net on the investment, after deducting the reasonable cost of maintenance, operation and taxes. Provided further, That the term maintenance and operation, hereinbefore referred to, shall not be held or construed to mean construction and extensions. The mayor and council of any such city shall at all times during the existence of any such grant, contract or privilege have the right by ordinance to fix a reasonable schedule of maximum rates to be charged for water for public and private purposes by any such person, company or corporation. Provided, however, That said mayor and council shall at no time fix a rate which will prohibit such person, company or corporation from earning at least eight per cent on its capital invested over and above its operating expenses and expenses for maintenance and taxes. In establishing and fixing such rates, the value of the plant and property of any such person, company or corporation shall be taken into consideration, but the value of such franchise, contract and privilege given and granted by the city to such person, company or corporation shall not be taken into consideration in ascertaining the reasonableness of the rates to be charged to the inhabitants of such city. The contract between the city and any such person, company or corporation receiving and securing such franchise shall be in writing, executed by the mayor and clerk of such city, and also by such person, company or corporation, in due form and it shall express the consideration as hereinbefore specified; and any attempt to evade, directly or indirectly, the requirements of this act as to such consideration, or the obligations and conditions of such contract, shall

render such contract and franchise absolutely null and void and inoperative.

903. Method for city acquiring plant. Sec. 168. If at any time after ten years from the time of granting such franchise, which said franchise shall be for a period not exceeding thirty years, the mayor and council shall, by ordinance, determine that it is necessary and desirable for the city to purchase and acquire the ownership of such water plant, an application may be presented in writing to the district court of the county in which said city is located, which shall set forth in general terms the action of the city relative thereto, and praying for the appointment of commissioners to ascertain and determine the value of such water plant. Thereupon a time shall be fixed for the hearing thereof, of which at least ten days' notice shall be given in writing to such person, company or corporation and to all persons having or claiming liens on such property, and said court shall make an order granting such application, and providing for the appointment and selection of three commissioners, one of which shall be selected by the city and one by the person, company or corporation owning such plant, and the third shall be designated by the judge of the court, who shall be an expert engineer, and the commissioners shall take an oath to faithfully, honestly and to the best of their skill and ability appraise and ascertain the fair cash value of said water plant and the appurtenances thereunto belonging or in any way appertaining; but in the determination of such value said commissioners shall not take into account the value of the franchise or contract given or granted by said city to such person, company or corporation. They may examine under oath experts and persons familiar with the costs and construction of such a plant, and resort to other means within their power, to the end that they may arrive at the value thereof, and each the city and the person, company or corporation may produce such testimony before said commissioners as may in their judgment seem necessary and desirable. Said commissioners shall make their report in writing, verified by affidavits, and file the same with the clerk of

the district court appointing the commissioners; thereupon, at a time to be fixed by the court, of which each party shall have ten days' notice in writing, a hearing shall be had as to whether such report shall be confirmed or not, and if confirmed it shall be ordered entered of record, and the said city shall have six months from such time to elect to take the property for the amount so fixed by said commissioners; and, when entered of record by the court, either party may file exceptions to such report, and, if sustained, the matter shall be referred back to said commissioners to correct any errors therein. If the city, by a majority vote of the people, elects to take the property for the amount so ascertained, the mayor and council are hereby authorized to enact a proper ordinance providing for the issuance of bonds, which bonds shall run for not exceeding thirty years, nor bearing a greater rate of interest than six per cent per annum, payable semi-annually; and in such ordinance the mayor and council may provide for the execution of a mortgage by the mayor and clerk of said city upon said water plant and all of the appurtenances thereunto belonging to secure the payment of such bonds, and the same shall be a prior lien upon the plant and the revenues therefrom; and if the city makes default in payment of any interest when the same becomes due, or the principal thereof, the said mortgage may be foreclosed as in other cases, and the property covered thereby sold as in other cases, and the proceeds applied to the payment of the judgment to be entered against the city in such action, and if there shall be any deficiency the same may be collected as other claims might or could be collected against the city. Said bonds may be sold by the mayor and council for not less than par and the proceeds shall be used only for the purchase of said plant. If the city elects to pay the award of the commissioners, it may do so within any time during six months from the date of such election, by paying the amount of the award to the clerk of the district court, and thereupon the title and right of possession of such plant and appurtenances shall vest absolutely in the city and it shall have the right to enter into

and take possession thereof. The court shall make all orders necessary to protect the city in its full possession of the property and plant. When the purchase money is paid for the plant it shall be paid only upon the order of the court. If there are any liens or incumbrances upon the plant, the nature and extent thereof shall be ascertained by the court, after fixing the time for the hearing, of which all parties in interest shall have reasonable notice. The ascertained liens and incumbrances shall be paid out of said funds and the balance to the person, company or corporation owning such plant.

904. Heat, light, power and street-railway franchises. Sec. 169. The municipal authorities of any city governed and controlled by the provisions of this act may permit any person, company or corporation to *manufacture*, sell and furnish gas light, electric light, power or heat to any city in this state, and street railways to be operated along and over the streets of and public grounds of the city, and may extend and renew any existing contracts with any such person, company or corporation for the construction and operation of a street railway over and along the streets, and for supplying gas lights, electric light, power or heat to any city in this state, upon the conditions hereinafter imposed in this act, which shall be specifically provided for in the ordinances and contracts granting or giving any such original grant, franchise, or privilege, or extending or renewing any existing grant, right, privilege, or franchise: Provided, That any contract, grant or franchise now existing or which may hereafter be granted to any such person, company or corporation shall not extend for any longer period of time than thirty years from the date of such grant or extension.

905. Consideration for franchise; rates. Sec. 170. As a consideration for a franchise to lay pipes through the streets of the city for gas or heat, or to string electric wires for light or power, to supply the inhabitants with light, heat, or power, or to construct, maintain and operate a street railway along and over

the public streets and grounds of such city, the said city may require in the ordinance granting such franchise or privilege or renewal or extension of any existing contract or franchise with any person, company or corporation a report once in six months. Said person, company or corporation shall pay into the city treasury ten per cent. of its net earnings over and above ten per cent. earnings on its investment by such person, company, or corporation; all contracts, grants and franchises now existing to or with any such person, company or corporation with the consent of the mayor and council may be extended and continued in force for a period not exceeding thirty years from date of such grant of extension. The mayor and council of any such city shall at all times during the existence of any such grant, contract or privilege have the right by ordinance to fix a reasonable schedule of maximum rates to be charged for public and private purposes, including street lighting by any such person, company, or corporation, to the inhabitants of any such city, for gas light, electric light, electric power, or heat, and the rates of fare on any street railway: Provided, however, That said mayor and council shall at no time fix a rate which will prohibit such person, company or corporation from earning at least ten per cent. on its capital invested in such city over and above its reasonable operating expenses and the expenses for maintenance and taxes.

906. Period of contract; how city may acquire title; natural gas. Sec. 170a. No renewal of original grant, lease or contract provided for in this act shall continue for a longer period than thirty years, and the city may acquire title to any gas light, electric light, electric power, street railway or heating plant of any private corporation upon the termination of any future grant, lease or contract made in accordance with this act, and all the rights, privileges and property thereto pertaining, in the following manner, to-wit: The city may, upon the termination of any future grant, lease or contract with any such corporation, file a petition in the district court of the county

in which such city is situated, against the owner or owners of any such plant and others interested therein, which petition shall contain a general description of the plant or property, setting forth the interest or property rights of said corporations or others therein, as near as may be done, and praying that the city may be permitted to acquire a title thereto in the manner provided in this act. Thirty days' notice shall be given to all persons interested in said property at the time for the hearing of said application, by publication in three successive issues of some weekly newspaper printed in such city having general circulation therein, the first of which shall not be less than thirty days prior to the time of the hearing, and also by delivering a copy of such notice to the manager of such plant, if such manager can be found within the county. In such proceedings, petition and notices it shall not be necessary to state the names of any of the parties interested as defendants, except those of the reputed owner or owners. At the time set for the hearing of such petition, the court shall appoint three disinterested commissioners, non-residents of the city, one of whom shall be named by the court, who shall be an expert engineer in such line, one by the city, and one by the company, person or corporation owning such plant. The commissioners so appointed, after having taken and subscribed an oath to faithfully and impartially discharge their duties as such commissioners, shall forthwith proceed to determine the then present value of any such plant, which value shall be a fair value thereof. The commissioners so appointed shall have power to administer oaths, to subpoena, and compel the attendance of witnesses and the production of books and papers, and any citizen, taxpayer or officer of the city may appear before them and be heard as to the city's interest. Within thirty days after their appointment, unless for good cause shown the time be extended by the court or the judge thereof, the commissioners shall file their report with the clerk of said district court. If any commissioner so appointed shall fail to act, or his place become vacant for any other reason, the vacancy shall be filled in the manner of his

original appointment. Within ten days after the filing of such report, any citizen of such city or other person interested may file exceptions thereto; and thereupon the court or the judge thereof shall appoint a time, not more than thirty days from the filing of such report, for the hearing of said exceptions, which exceptions shall be heard in a summary manner, without pleading, and upon such hearing the court may confirm the said report, or may set the same aside, as shall be just, and appoint new commissioners. In the event that such report shall be set aside, further proceedings shall be had in all respects as in the case of the original appointment of commissioners, until the award of the commissioners shall be confirmed by the court. Said commissioners shall be allowed three dollars per day for services rendered, to be paid out of the city treasury. At any time within four months after the confirmation of such award by the district court, the city may deposit the amount of the award with the treasurer of the county, for the use of the owner or owners or others interested in such plant; and if for any cause such commissioners so appointed shall fail or refuse to make and file their report within the time limited therefor, the court, by attachment, may compel such filing, or may discharge such commissioners and cause new ones to be appointed as hereinbefore prescribed. From the time of making such deposit with the county treasurer, the city shall be absolute owner of any and all privileges, property and property rights of any such corporation and all others in any way interested in any such plant, free and clear of the claims of all persons theretofore interested therein. Upon application of the city, writs of assistance shall be granted by said district court, directing the sheriff of the county to put such city into possession of such plant. The court shall determine as to the proper disposition of the sum so awarded, including the rights of incumbrancers, owners, and all others interested therein, and any such person aggrieved by such determination may review the same by petition in error in the supreme or appellate courts.

Nothing in this act shall be construed as prohibiting any city governed and controlled by the provisions of his act from granting, and the mayor and council of any such city are hereby authorized to grant, to any person, company or corporation, a franchise to construct, maintain and operate a natural gas plant for the purposes of furnishing to said city and its inhabitants natural gas for lights, fuel and all other purposes, with authority to lay and maintain all necessary mains and pipes in the streets, avenues, alleys and public grounds of said city on such terms and conditions as may be agreed to by said mayor and council and such person, company, or corporation: Provided, That such franchise shall not continue for a longer period than twenty years.

PUBLIC UTILITIES—CHAPTER 238, LAWS 1911.

An Act relating to public utilities and common carriers, being an act creating the Public Utilities Commission for the state of Kansas, prescribing its powers and duties and providing for the regulation and control of public utilities and common carriers, and providing penalties for the violation of the provisions of this act, and repealing original sections 7063, 7064, 7065 and 7066 of the General Statutes of Kansas of 1909.

Sec. 1. The Board of Railroad Commissioners of the state of Kansas is hereby constituted and created a Public Utilities Commission for the state of Kansas, and such commission is given full power, authority and jurisdiction to supervise and control the public utilities and all common carriers, as hereinafter defined, doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.

Sec. 3. The term "public utility," as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for

private use, any equipment, plant, generating machinery, or any part thereof, for the transmission of telephone messages or for the transmission of telegraph messages in or through any part of the state, or the conveyance of oil and gas through pipe lines in or through any part of the state, except pipe lines less than 15 miles in length and not operated in connection with or for the general commercial supply of gas or oil, or for the operation of any trolley lines, street electrical or motor railway doing business in any county in the state; also all dining car companies doing business within the state, and all companies for the production, transmission, delivery or furnishing of heat, light, water, or power; provided, that this act shall not refer to or include mutual telephone companies. That mutual telephone companies, for the purposes of this act, shall be understood to mean any co-operative telephone company operating only for the mutual benefit of its subscribers without profit other than in the service received. Nothing in this act shall apply to any public utility in this state owned and operated by any municipality. The power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally within any city or principality operated for the benefit of such city or its people, shall be vested exclusively in such city, subject only to the right to apply for relief to said Public Utilities Commission as hereinafter provided in Section 33 of this act.

Sec. 20. Whenever any common carrier or public utility governed by the provisions of this act shall desire to make any change in any rate, joint rate, toll, any rule or regulation or practice pertaining to the charge or classification or schedule of charges, or in service or rates of any such public utility or common carrier, such public utility or common carrier shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by such public utility or common carrier, and such changes shall be plainly indicated by proper reference marks in amendments or supplements to ex-

isting tariffs, schedules or classifications, or in new issues thereof. No change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the commission, and within thirty days after such changes have been authorized by said Public Utilities Commission, then copies of all tariffs, schedules, and classifications, and all rules and regulations, shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection.

Sec. 30. Unless the commission shall otherwise order, it shall be unlawful for any common carrier or public utility governed by the provisions of this act within this state to demand, *collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same services on the 1st day of January, 1911.*

Sec. 38. If any common carrier or public utility governed by the provisions of this act shall violate any of the provisions of this act, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it in this act, or shall fail, neglect or refuse to obey any lawful requirement or order made by the commissioners, or any final judgment or decree made by any court upon appeal from any order of the commissions, it shall, for every such violation, failure or refusal, forfeit and pay to the support of the common schools a sum not less than one hundred dollars and not more than one thousand dollars for such offense. Such forfeiture shall be enforced and collected by the attorney-general in any court of competent jurisdiction. In construing and enforcing the provisions of this act, any act, omission or failure of any officer, agent or other person acting for or employed by any such public utility or common carrier while acting within the scope of his employment, shall in every case be deemed to be the act, omission or failure of such public utility or common carrier, and every day during

which any such public utility or common carrier or officer, agent or employee thereof, shall fail to comply with any order or direction of the commissioner, or to perform any duty required or enjoined by this act, shall constitute a separate and distinct violation of the provisions of this act.

Sec. 39. The commission may compel compliance with the provisions of this act and compel compliance with the orders of the commission by proceeding in mandamus, *injunction* or other appropriate civil remedies, or by appropriate criminal proceedings in any court of competent jurisdiction.

Published May 22, 1911.

There was no public utilities act prior to this date in Kansas.

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In the

Supreme Court of the United States

October Term, 1913.

No. 472.

THE WYANDOTTE COUNTY GAS COMPANY, *Plaintiff in Error,*

vs.

THE STATE OF KANSAS, on the Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, *Defendant in Error.*

REPLY BRIEF OF PLAINTIFF IN ERROR.

J. W. DANA,
Solicitor for Plaintiff in Error.
W. F. DOUTHIRT,
Of Counsel.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO

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REPLY BRIEF OF PLAINTIFF IN ERROR.

It is passing strange that defendant in error cites and relies on *In re Pryor*, 55 Kan. 724, as the leading and controlling Kansas case for the contortionate and nullifying construction of the statutes in the case at bar. That very case repeatedly recognizes that *implied authority* is sufficient; that a rate-contract may and often does arise as a necessary incident to a street-rights grant; that in such grants providing in the first instance for a utility the fixing of rates

may be not only convenient but indispensable; "that in the grant of *consent* * * * to use the streets * * * a *condition* might be imposed as to the maximum rates to be charged"; that neither the city nor the state may impair such contract; that the authority to make a rate-contract was not involved in that case; and that no authority was vested in the city by a subsequent ordinance to *regulate* rates of a utility theretofore charging rates agreed to under implied authority incident to a street-rights grant. The judgment of the court in fact sustained the rates fixed by the company and agreed to by the city at the time of the assignment of the street-rights grant with the city's consent.

In re Pryor was a proceeding in *habeas corpus;* the town of Iola, a third class city, had authority to grant street-rights or to *consent* to the use of the streets for conveying gas. It had no express authority to contract or *regulate* rates at any time. The only implied authority it had was that coupled with its authority to consent to the use of its streets; it passed an ordinance consenting to such use of its streets in which no rate was fixed to the consumers, but a rate of $1.00 per thousand cubic feet was fixed for public lighting. Three years thereafter, the grantee assigned said street-rights grant with the consent of the city, which consent stipulated certain rates to be charged to consumers; six years thereafter, nine years after the street-rights grant, the city passed an ordinance *regulating* rates for natural gas and imposing penalties for the violation thereof; Pryor ignored said ordinance and continued to collect the prices consented to by the city at the time of the

assignment of the street-rights grant; thereupon he was prosecuted in police court, convicted and confined in the city prison, and this original proceeding in *habeas corpus* in the supreme court was prosecuted for his release.

In the statement of the case Chief Justice Martin, one of the most able equity jurists that ever graced the supreme bench of Kansas, refers to the rates stipulated in the city's consent to the assignment of the street-rights grant as "contract rates" (p. 725); in the opinion he deals with the broad proposition that general legislative power is a sovereign power vested in the legislature and passes to and "must be vested in the governing body of the city by the legislature in express terms, *or be necessary or fairly implied in and incident to the powers expressly granted*" (p. 727), thus clearly committing the state to the proposition that legislative power may pass by implication. He says that the city charter acts of third class cities contain no express grants of power to fix or *regulate* the prices of gas and that such power does not arise from the general welfare clause; he points out that the city of Iola relied for its power to regulate rates upon the general incorporation laws granting certain privileges and powers to *corporations* as such and containing no provision whatever conferring any power upon *cities*. He then observes that:

> "Whether they might, as a *condition* of their *consent* (to use the streets) provide that gas or water should be furnished to the city or its inhabitants at *not exceeding certain prescribed rates* we need not now inquire. (That question was not before the court.) *Consent* was granted

> by ordinance No. 268 to the Iola Gas & Coal Co., its successors and assigns *without annexing any condition as to rates*, except that no more than one dollar per thousand cubic feet should be charged for lighting the public buildings."

He again observes on page 728 that rate making is a sovereign legislative power,

> "Which may not be delegated to cities or subordinate divisions of the state, except in express terms *or by necessary implication*. No such power is expressly conferred upon cities of the third class, and we do not think the right can be implied from any express provision, *unless possibly that in the grant of consent to any person or corporation to use the streets and public grounds of the city a condition might be imposed as to the maximum rates to be charged*."

Note that the term "*condition*" twice used in this opinion, "as to the maximum rates to be charged" is the same expression used in Sec. 170a by the legislature when it authorized the mayor and council of Kansas City to grant a franchise to construct, maintain and operate a natural gas plant "On such terms and *conditions* as may be agreed to." A "condition might be imposed as to the maximum rates to be charged," and that was the condition which the mayor and council were expressly authorized to agree to on behalf of the State of Kansas. Thus leaving no room for "balanced doubt" arising from the implication of necessity in exercising the authority to grant street-rights. This opinion is a part of the contract of the plaintiff in error. It was rendered in 1895 prior to the passage of Sec. 170a and

prior to the entering into of said contract. Certainly the parties are entitled to have their rights measured and said statute construed in view of the broad grant of power to agree on terms and conditions, to include the essential "condition which might be imposed as to the maximum rates to be charged" under the authority of this case.

Again, the statute under consideration in that case was in no way similar to the statutes now under consideration and the ordinance-contract did not in terms fix rates. The case cannot in any fair sense be a precedent justifying any "court to contract or clip the legislative grant" in the statute at bar. (*Banks* v. *Arkansas City*, 76 Fed. 271.) "Nor should it be deprived of its meaning, if it is plainly and clearly expressed" (*Minneapolis St. Ry. Co.* v. *Minneapolis*, 215 U. S. 417), that "the mayor and counsel are hereby authorized" to grant a franchise to construct, maintain and operate a natural gas plant to furnish gas to said city and its inhabitants and to lay all necessary mains in the streets on such terms and *conditions* "as to maximum rates to be charged" (*In re Pryor, supra*) as may be agreed to.

Water, Light & Gas Co. v. *City of Hutchinson*, 207 U. S. 385, is also cited by defendant in error. This case can throw no light upon the proper construction of the statute at bar nor is it any aid to this Court in determining the line of decisions of the Kansas courts for the very apparent reason that it originated in the United States District Court and was never in the Kansas courts. Again, it was not a rate-contract case. The company claimed an exclusive franchise in spite of the fact that the grant was not such in terms nor was there any authority

express or implied for such exclusive grants, and they were prohibited by express legislation in almost every city charter act of the state, and no claim therefor was ever sustained by the courts of the state; and the repeated decisions of the courts of said state were that no such exclusive grant was authorized in the state of Kansas; but even in this case the second paragraph of the syllabus admits that an exclusive privilege may be granted by implication from other powers if indispensable to the exercise of those powers.

It is well to note that even in that case this Court, in construing the Kansas decisions, recognized the rule of liberal construction of Kansas statutes authorizing rate-contracts as being the law of that state, when it said:

> "The Kansas cases relied on are *Eureka Light & Gas Co.* v. *City of Eureka*, 5 Ka. App. 669; *State* v. *The City of Topeka*, 68 K. 177; *Cherryvale Water Co.* v. *City of Cherryvale*, 65 K. 219. In those cases the court did say, in determining what duties were imposed or powers conferred upon the city, that *the statute should be liberally construed to effectuate the general purpose of the legislature*, but the powers under consideration were different from the powers herein invoked. Otherwise those cases would not be reconcilable with *Payne* v. *Spratley*, 5 K. 525, 545; *Mining Gas Co.* v. *Gas Mining Co.*, 55 K. 175-8."

Then this Court, analyzing the latter cases, shows exclusive grants have always been denied in Kansas.

On the other hand, the first cases above mentioned by the court, though not analyzed, were as a matter of fact franchise grants which this Court

found had been liberally construed by the courts of Kansas to effect the general purpose of the legislature and were a different class of powers than the power to grant exclusive privileges claimed in the Hutchinson case. In the Eureka case, *supra*, the Kansas court said that the city had "the specific authority to grant such a franchise and the *incidental* power to make *terms* and *conditions* is clearly possessed by a city of the second class." In the Cherryvale case the Kansas court held the city bound on its franchise contract to the exercise of good faith—"the fulfillment of contracts to the same extent that such obligations are imposed upon individuals." This has become a rule of property and construction of contracts involving property rights in the state of Kansas, which the state can not now repudiate and ignore under the late ruling of this Court in *Old Colony Trust Co.* v. *City of Omaha*, 33 Sup. Ct. Rep. 967, Advance Sheets.

Fixing of Rates Indispensable to a Natural Gas Franchise.

While we contend that the authority to agree on terms and conditions is full and express authority for the terms and "conditions as to rates to be charged" (*In re Pryor, supra*) agreed to; yet, even if this express delegation of authority were not given the Kansas statutes and decisions read together and the record in this case show, that the fixing of rates was an indispensable "*condition*" to the exercise of the power conferred to grant a natural gas franchise, because the manufactured gas franchise and plant were already in existence and operation

and the power to *regulate* the rates for such gas was expressly reserved in the statute. The city was demanding this cheap, luxuriant natural product not only for light, but in the language of Sec. 170a, "For lights, *fuel and all other purposes*," and to obtain said gas for *fuel and all other purposes* at the time of granting a franchise to construct, maintain and operate a plant therefor, it was absolutely indispensable to the exercise of such power and to obtain such gas for such purposes theretofore unknown to said city to fix by contract the rates therefor, which was done in the franchise at the ridiculously low price of 25 and 27 cents per thousand cubic feet for lights and *fuel-gas* for domestic consumers, and "*special rates*" (Rec. Or. 55, pt. 34) "for all other purposes."

The recent case of *City of Emporia* v. *Telephone Co.*, 87 K. 465, fixed a schedule of fares and provided for the payment of two per cent of the gross receipts and free service for certain offices and departments of the city. In a suit to enjoin the two per cent payments and free service on the ground that such provisions in the franchise were unauthorized and void, the court held that:

> "They should be upheld as against the grantee when assented to by acceptance of the ordinance imposing them—whereby they become a matter of *contract* and the grantee has long enjoyed the benefits and privileges of the same *contract*." (P. 473.)

The Freeport Case Is no Guide to the Construction of the Statute in this Case.

Counsel for Kansas City dwells at length on the language of this Court in the Freeport case and the Rogers Park Water Company case and the Danville case. These cases are in a class by themselves and are serviceable only in the construction of the Illinois statute which conferred no authority whatever in any event to *consent*, to *agree*, or to *contract*. It merely delegated authority to "pass ordinances," to legislate, to command; and this Court held that the statute in question conferred no power upon the city to consent, agree or contract.

While in the case at bar express, positive, unequivocal authority is conferred "to agree on terms and conditions."

Stanislaus County v. *San Joaquin & K's R. C. & I. Co.*, 192 U. S. 201, cited by defendant in error, is not in point, for the reason that the statute under which the irrigation grant was made expressly reserved the power to regulate water rates.

The syllabus reads:

> "No contract that the state would not thereafter authorize the board of supervisors to reduce water rates so as to yield to the stockholders less than one and one-half per cent per month on the capital actually invested by a corporation organized under Cl. Stat. 1853, p. 87, as amended by Cl. Stat. 1862, p. 540, was created by the provision of Sec. 3 of the latter Act that if such company should have power to establish its rates, which should be subject to regulation by the appropriate board of supervisors, but should not be reduced by them below that point.

> Assuming that a contract exemption from the reduction by a board of supervisors below a certain point was created in favor of the company organized under Cl. Stat. 1853, page 87, as amended in the Cl. Stat. 1862, page 540, by the provisions of Sec. 3 of the latter Act, the legislature, in the exercise of its reserve power to alter and repeal, conferred by Cal. Const. 1849, 4, Sec. 31, still could enact the provisions of the Cl. Stat. 1885, page 95, Sec. 5, authorizing the supervisors to reduce the rates to not less than six nor more than eighteen per cent upon the then value of the property actually used in supplying water to the public."

A careful reading of this decision shows that the board had no authority whatever to fix water rates by contract, no power to agree or consent. Its duties were similar to those of the Public Utilities Commission. Its only power was that of regulation. In discussing the statute the court said:

> "The authority given by the Act of 1862 enabled the board of supervisors to conditionally regulate the rate. There is no promise made in the Act that the legislature would not itself subsequently alter that authority. The statute simply authorized its agent, the board of supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied that the state might not thereafter authorize the boards to reduce them, or that it might itself do so directly. *Even as between individuals such an implication would not be a reasonable one from the language used.*"

Owensboro v. *Owensboro Water Works*, 191 U. S. 358, is cited by defendant in error. This case was merely a construction of the ordinance itself. It

did not involve the construction of any statute granting authority to contract rates—on the contrary it was a denial of any authority in the city to either contract or regulate rates, and a claim that an untrammeled right of contract existed in the utility itself to fix its own rates at will and pleasure without either contract, supervision or regulation by the city or the state, it is no guide to the construction of the statute at bar. In that case the Company contended that "In the absence of an express contract the individual or corporation furnishing water for domestic purposes may charge whatever seems right and reasonable."

Counsel vs. Court. That the State May Authorize an Irrevocable Contract Is Held by the Kansas Supreme Court in this Case.

The city counsellor of Kansas City, Kansas, raises in this Court, for the first time in this case, the contention that the state of Kansas may not authorize an irrevocable contract. Suffice it to say that the Kansas Supreme Court in this very case has held to the contrary, and that decision is not reviewable here. The court says:

> Syllabus 3. "The power to contract for rates for the furnishing of water, light, heat or power to a city or its inhabitants, is a sovereign governmental power. * * * The power may be delegated to the mayor and council of a city." (Rec. Or. 87, pt. 54.)

In the opinion, the court said:

> "Chapter 136, Laws of 1903, did authorize the mayor and council of Rosedale to make such

contract and they did make such contract. (Rec. Or. 96, pt. 60.)

In Rosedale, however, a contract authorized by law exists and such contract with the limitations therein provided must govern."

This Ordinance Has Been Construed as a Contract by the Supreme Court of Kansas.

In *Wyandotte County Gas Company* v. *Comm'rs*, 68 K. 195, the Kansas court again disagrees with counsel on this contention and holds the very franchise at bar to be a contract, thus:

> "Ordinarily franchise-ordinances constitute contracts, the obligation of which cannot be impaired. Franchises like those the plaintiff enjoys may be bought and sold for a price in money."

Primary and Secondary Franchises Distinguished.

The claim of defendant in error that the franchise derived direct from the state *to be* or to exist as a corporate entity is the same as the franchises *to do, to have* and *to hold*, from the state or its agencies by its authority are one and the same thing, and that the reserve power to modify, repeal or amend all laws of a general nature for the organization of corporations is applicable to such secondary franchises has been too frequently decided to the contrary by the Supreme Court of Kansas and by this Court to be open to question.

In the case of the *State* v. *Water Co.*, 61 K. 547, the Supreme Court of Kansas clearly distinguished

between the primary franchise *to be* and the secondary franchises *to do*, as follows:

> "Secondary Franchises May Be Alienated. Corporations cannot sell or mortgage those franchises received from the state which confer power upon them to exist as artificial bodies; but those franchises denominated as secondary, which include the privileges granted by a city to a water company, with the right to take tolls, etc., may, under our statute, be lawfully alienated or encumbered."
>
> * * * * * * *
>
> "The rule is that the primary franchise of being a corporation vests in the individuals who compose it and not in the corporation itself, while the secondary franchises, such as the right of a railway to construct and operate its road, or the right to operate a water plant and collect water rents, are vested in the corporation. The principle stated has been generally approved by the courts in this country. (*Union Pacific Railroad Co.* v. *Lincoln County*, 1 Dill. 325, Fed. Cas. No. 14,378; *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 619, 5 Sup. Ct. 299, 28 L. Ed. 860; *The State ex rel.* v. *Irrigating Co.*, 40 Kan. 96, 19 Pac. 349; *Jog* v. *The Jackson and Michigan Plank Road Co.*, 11 Mich. 164; *Detroit* v. *Mutual Gas Light Co.*, 43 Mich. 594, 5 N. W. 1039; *Fietsam* v. *Hay et al.*, 122 Ill. 293, 13 N. E. 501.)"
>
> "In the making of said contract evidenced by ordinance the city was not exercising legislative or governmental powers, but *quasi* private power conferred by the law, and in such matters it could exercise its business affairs governed by the same rules as apply to an individual or a private corporation. (1 Dill. Mun. Corp. Sec. 27, and cases cited; *Illinois Trust & Savings Bank* v. *City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271, 34 L. R. A. 518.)"

Construction of the Ordinance not Raised Below.

On page 79 of defendant in error's brief counsel for Kansas City, Kansas, raises for the first time in this court a question of fact, claiming that the franchise-contract in terms does not authorize the rates specifically named therein; we assume that this court will not consider that question here as it was not raised below nor considered by the court nor adversely passed upon in the opinion. On the trial of this case the facts were admitted. The record (Or. 11, pt. 25) shows the following:

> "Court: There's no dispute about the facts, is there?
> Mr. Marshall: No, I think not.
> Mr. Dana: I think not."

The only evidence offered by Mr. John Marshall, attorney for the defendant in error, was certain affidavits and admissions of plaintiff in error showing that the company was charging the contract-rate of twenty-seven cents at the time the suit was brought and that the rate charged and collected on January 1st, 1911, was twenty-five cents. (Or. 42, pt. 24.)

> "Mr. Marshall: There's certain affidavits here with reference to the increasing of the price. The defendant has also filed the affidavit of Mr. M. J. Berry concerning certain matters with reference to the price of gas in January last and increasing the price of gas. I believe that is all."

The Kansas Supreme Court Foreclosed the Construction of the Contract Here by Holding that it Definitely in Terms Fixed the Rates.

In the opinion the court says (Or. 93, pt. 58):

> "The remaining question is whether the ordinance of Kansas City, No. 6051, became, upon the acceptance thereof by the appellant, a contract binding upon the city, *as it purports to be*, for a period of twenty years after the passage and publication thereof."

Erroneous Citation in Brief of Defendant in Error and the Supreme Court's Citation of Statute.

On page 21 of counsel's brief, and also in the record (Or. 125, pt. 77) of the opinion of the court below, Sec. 170 is inadvertently miscited, in that the author places a comma after the word "gas" in the provision reserving power to regulate rates for "*gas light*," electric light, power or heat. This oversight may be the cause for the error of the court below in construing the statutes, for Sec. 170, Chapt. 122, Laws of 1903, after dealing with manufactured gas franchises expressly reserves power to regulate rates in such franchises, in the following language:

> "The mayor and council of any such city shall at all times during the existence of any *such grant*, contract or privilege, have the right by ordinance to fix a reasonable schedule of maximum rates to be charged, for public and private purposes, including street lighting by any such person, company or corporation, to the inhabitants of any such city, for *gas light*, electric light, electric power, or heat, and the rates of fare on any street railway."

Thus, it is quite apparent that the legislature in expressly reserving the power of rate regulation in this section when it names, not gas for fuel and all other purposes, but merely "gas light," is not dealing with the same subject-matter as it is in Sec. 170a, when it expressly excludes that reservation by reciting that,

> "Nothing in this act shall be construed as prohibiting * * * and the mayor and council of any such city are hereby authorized to grant * * * a franchise to construct, maintain and operate a natural-gas plant for the purposes of furnishing to said city and its inhabitants natural gas for *lights, fuel and all other purposes*, with authority to lay mains in the streets * * * on such terms and conditions as may be agreed to. * * * Provided that *such franchise* shall not continue for a longer period than twenty years."

Defendant in error seeks by contortionate construction to remove the qualifying clause, "for a longer period than twenty years," from the authority to grant the franchise to construct, maintain and operate the plant, and yet the very proviso in express terms uses the words "such franchise," referring back to the "*franchise* to construct, maintain and operate a natural-gas plant." Had the legislature intended the qualifying clause "for a longer period than twenty years" to apply only to the grant of street-rights it would not have been placed as a proviso to the whole section and the words "such franchise" would not have been used and the power to

agree on *terms* and *conditions* would never have been coupled with the authority to grant a franchise to construct, maintain and operate the plant.

The Public Utility Act.

Much space is consumed in the brief of defendant in error on the construction of the Kansas Public Utilities Act and a multitude of cases are cited having no bearing on the question at issue here. For instance, *Louisville R. C.* v. *Motley*, 31 Sup. Ct. Rep. 265, is quoted at length. That case involved an Act of Congress to regulate interstate commerce. It is elementary that the constitutional limitation, "No state shall pass any law impairing the obligation of contracts," is no limitation upon the power of Congress to pass laws impairing the obligations of contract under its power to regulate interstate commerce.

The Kansas Public Utilities Act, like most such acts, removes all power of regulation of rates and supervision and control from the local authorities and vests that power in a tribunal having state-wide jurisdiction the better to enable it to deal fairly and wisely with public utilities, as well as to regulate rates, and in this very case the Kansas Supreme Court wholly ignored the rights of Kansas City, Kansas, under this contract on the theory that it was a contract with the state, and that the city could not invoke the constitutional inhibition against the impairment of contracts as against the state when it said in the opinion (Rec. Or. 96, pt. 60):

> "Hence the rate for gas therein may be *increased* by appellant to whatever sum per

thousand feet will receive the consent and approval of the public utilities commission."

Clearly indicating that the maximum limit of rates fixed in the ordinance was no limitation upon the power of the state to *consent* to a still higher rate if the company saw fit to apply therefor, and the state deemed such raise wise and equitable. The creature can have no greater rights or powers than its creator.

Wherefore plaintiff in error submits that the judgment of the state court should be reversed and said cause remanded with instructions to enter judgment for plaintiff in error for costs.

J. W. DANA,
Solicitor for Plaintiff in Error.

W. F. DONTHIRT,
Of Counsel.

No. 995

In the

Supreme Court of the United States

October Term, 1913

THE WYANDOTTE COUNTY GAS COMPANY,
Plaintiff in Error,

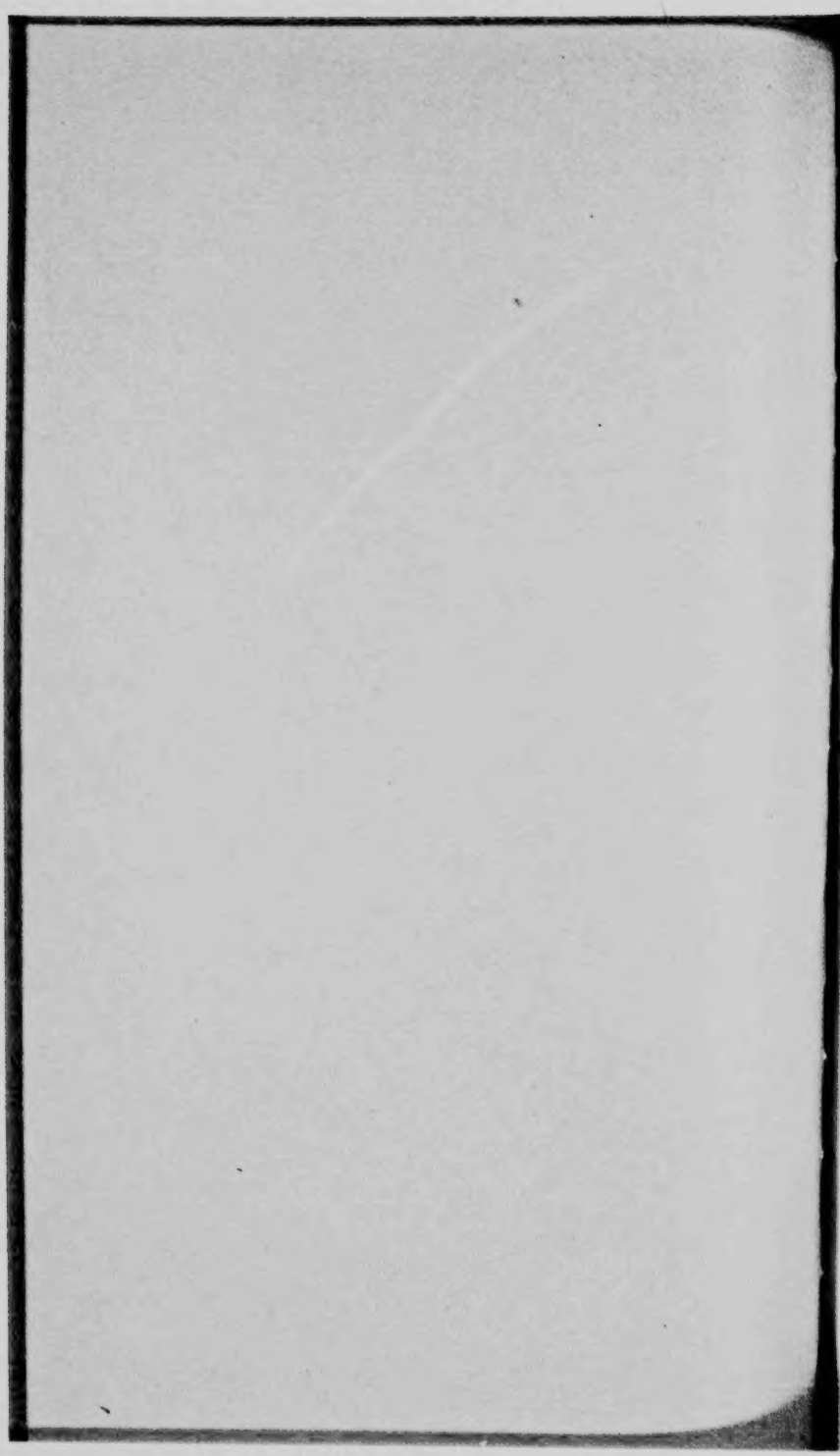
vs.

THE STATE OF KANSAS, on Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, *Defendant in Error.*

In Error to the Supreme Court of the State of Kansas.

BRIEF OF PLAINTIFF IN ERROR ON THE MOTION OF DEFENDANT IN ERROR TO DISMISS.

J. W. DANA,
Solicitor for Plaintiff in Error.



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Theory of Defendant in Error. 1

This Court will decide for itself whether or not a contract exists, claimed to be impaired by legislation:

(1) *Bacon* v. *Texas*, 163 U. S. 207, 16 Sup. Ct. Rep. 1023. 30-34

(2) *Cross Lake Shooting and Fishing Club* v. *State of Louisiana*, 32 Sup. Ct. Rep. 577, 224 U. S. 632. 25-26

(3) *McCullough* v. *Commonwealth of Virginia*, 19 Sup. Ct. Rep. 134, 172 U. S. 102. 17-25

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In the

Supreme Court of the United States

October Term, 1912.

THE WYANDOTTE COUNTY GAS COMPANY,
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THE STATE OF KANSAS, on Relation of John Marshall, Attorney for the Public Utilities Commission of the State of Kansas, *Defendant in Error.*

In Error to the Supreme Court of the State of Kansas.

No. 995.

BRIEF OF PLAINTIFF IN ERROR ON THE MOTION OF DEFENDANT IN ERROR TO DISMISS.

Defendant in error moves to dismiss the writ of error for want of a federal question on the theory that a state may by legislative Act impair a contract and by judicial decree give effect to that Act; and then devest this Court of jurisdiction to review that decision by holding that no contract ever existed

and therefore none could be impaired. The statement of the theory discloses its fallacy.

This suit was commenced in the name of the State of Kansas on the relation of John Marshall, Attorney for the Public Utilities Commission of said state, and prosecuted to final judgment in the state courts, enjoining the plaintiff in error from charging and collecting the schedule of rates and prices fixed and agreed upon in certain duly authorized written contracts executed in 1901 and 1905, now existing between the plaintiff in error and the cities of Rosedale and Kansas City, Kansas, for the reason and on the alleged grounds that plaintiff in error proceeded to charge and collect said contract rates without procuring the consent of the Public Utilities Commission so to do, as required by the Act of the Legislature creating said Commission, passed in 1911, seven years after the formation of said contracts.

Thus the two essentials to this Court's jurisdiction appear on the face of the record, to-wit: That the "State * * * passed * * * a law impairing the obligation of contracts," and that the state courts have "given effect" to that Act. Other federal questions appear on the record but this is sufficient for jurisdictional purposes.

The record shows that some time prior to 1903 natural gas was discovered and developed in southeastern Kansas, and the cities of Rosedale and Kansas City, Kansas, being desirous of procuring the same, granted franchises providing for the furnishing and supplying to said cities and their inhabitants natural gas for a period of twenty years; said franchises, among other terms and conditions, contained schedules of rates and charges for said natural gas graduated from 25 cents to 40 cents per thousand cubic feet, effective at successive periods during the life of said franchises. The grantees duly accepted said grants according to their terms, and gave the bonds required for their specific performance, and thereafter duly

assigned the same to the plaintiff in error. Pursuant to and in accordance with the terms and requirements of said contracts the grantees and their assigns expended large sums of money, exceeding a million dollars, in constructing plants and distributing systems necessary to furnishing said natural gas to said cities and their inhabitants, and in due time, on or about November 19, 1905, commenced furnishing the same, and have continued so to do, at the prices agreed upon, fixed and determined in said contracts from said date until the present time with but slight interruption, as will hereinafter more fully appear.

Agreeably to the schedule of rates so fixed by contract the plaintiff in error was, on or about November 19, 1911, entitled to charge, collect and receive 27 cents per thousand cubic feet for said gas, which is a greater compensation therefor than the rate fixed in said contract-schedule for the same service on the 1st day of January, 1911, which the Public Utilities Act of 1911 in express terms prohibited plaintiff in error from charging, as will hereinafter appear.

Now, these franchise-contracts were entered into, and so performed in part as aforesaid, under legislative authority specifically authorizing cities of the second class, such as Rosedale, to contract for natural gas and fix rates for a period of twenty years; and under specific legislative authority to cities of the first class, such as Kansas City, Kansas, to provide for natural gas and grant franchises therefor, "on such terms and conditions as may be agreed to by said mayor and council and such person, company or corporation," the grantee.

The Act governing the Rosedale contract reads as follows:

> "The mayor and city council of any city of the second or third class shall have the power and are hereby authorized to grant to any person, company or corporation the use of the streets, alleys and public grounds for the erection of electric light poles and wires for laying gas, water

and steam pipes or conduits to be used in supplying said city and its inhabitants or any person or corporation with water, light, heat or power under such restrictions as shall protect public and private property; *Provided*, that no franchise right-of-way or privilege of any character whatever shall be granted by the mayor and council for a longer period than twenty years." (L. 1903, Chapt. 136, Sec. 1; G. S. 1905, Sec. 662.)

"The mayor and city council of any city of the second and third class are hereby authorized to contract for and fix rates for private consumers for a period not exceeding twenty years with any person, company or corporation for supplying the city and its inhabitants with water or fire protection or lighting or supplying with water and light the streets, alleys, parks and city buildings, or furnishing water, heat, light or power for public or private use." (*Id.*, Sec. 2; G. S. 1905, Sec. 663.)

The Act relating to cities of the first class authorizing the Kansas City, Kansas, contract provided with great particularity and detail for the granting of manufactured gas, electric, water and street railway franchises for a term of thirty years, requiring detailed reports and the payment of percentages of the receipts to the city, and expressly reserving to the mayor and council the right to regulate rates at all times during the life of such grants. Then, by reason of the recent advent of natural gas and the extreme desire of cities to procure the same, expressly excluded all such provisions from natural gas contracts and provided in Sec. 170a, Chapt. 122, Laws of 1903, as follows:

"*Nothing in this Act* shall be *construed as prohibiting* any city *governed and controlled by the provisions of this Act* from granting, and the mayor and council of any such city *are hereby authorized* to grant to any person, company or corporation a franchise to construct, maintain and operate a *natural gas plant* for the purpose of furnishing to said city and its inhabitants *natural gas* for lights, fuel and all other purposes, *with authority* to lay and maintain all necessary mains and pipes in the streets,

avenues, alleys and public grounds of said city *on such terms and conditions as may be agreed to by said mayor and council and such person, company or corporation; Provided*, that such franchise shall not continue for a longer period than twenty years."

The record further shows that both parties to these contracts, believing them to be fully authorized and mutually binding, continued to strictly observe their terms and provisions until after the regular session of the Legislature of 1911, which created the Public Utilities Commission, vested it with certain powers, duties and authority and provided, among other things, as follows:

"SECTION 1. The Board of Railroad Commissioners of the State of Kansas is hereby constituted and created a Public Utilities Commission for the State of Kansas, and such Commission *is given full power, authority and jurisdiction to supervise and control the public utilities* and all common carriers as hereinafter defined doing business in the State of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.

SEC. 3. The term 'public utility' as used in this Act shall be construed to mean * * * all companies for the production, transmission, delivery or furnishing of heat, light * * * or power * * *.

SEC. 7. The attorney for the Board of Railroad Commissioners shall hereafter be the attorney of the Public Utilities Commission, and his office shall hereafter be known as the office of the attorney of the Public Utilities Commission, * * * and he shall have the same powers and perform the duties now devolving upon the attorney for the Board of Railroad Commissioners, and he shall act as counsel for the Public Utilities Commission and perform such other duties as shall be imposed on him by the Public Utilities Commission. * * *

Sec. 205 of the Act relating to the Board of Railroad Commissioners, being Sec. 7182, G. S. '09, provides: The office of the attorney for the Board of Railroad Commis-

sioners is hereby created. * * * It is hereby made the duty of such attorney * * * to prosecute and defend all suits and proceedings in behalf of the State, *in the name of the State*, in connection with the acts of said Board, and on behalf of parties complaining of unjust discrimination by any railroad or other violations of this Act.

SEC. 20. * * * No *change shall be made in any rate*, toll, *charge* or classification or *schedule of rates* * * * of any such public utility * * * *without the consent* of the Commission. * * *

SEC. 30. Unless the Commission shall otherwise order it shall be *unlawful* for any * * * public utility governed by the provisions of this Act within this state *to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same services on the 1st day of January, 1911.*

SEC. 38. If any * * * public utility * * * shall violate any of the *provisions of this Act or shall do any act herein prohibited* * * * it shall for every such violation, failure or refusal forfeit and pay to the support of the common school funds a sum *not less* than $100.00 and not more than $1,000.00 for such offense. * * * In construing and enforcing the provisions of this Act, any act, omission or failure of any officer, agent or other person acting for or employed by any such public utility * * * while acting in the scope of his employment shall in every case be deemed to be act, omission or failure of such public utility; * * * and every day during which any such public utility * * * or officer, agent or employee thereof shall fail * * * to perform any duty required or enjoined by this Act shall constitute a separate and distinct violation of the provisions of this Act.

SEC. 39. The Commission *may compel compliance with the provisions of this Act* and compel compliance with the orders of the Commission *by* proceedings in mandamus, *injunction* or other appropriate civil remedies, or by appropriate criminal proceedings in any court of competent jurisdiction.

SEC. 44. This Act shall take effect and be in force from and after its publication in the statute book." (The statute book was duly published May 22, 1911.)

Thereafter, and on or about November 19, 1911, plaintiff in error commenced to charge, collect and receive said 27 cents per thousand cubic feet as per said contract-schedule without procuring the consent of the Public Utilities Commission so to do, believing, in all good faith, that its contracts excepted it from the provisions of said Act.

Thereupon, and on or about January 4, 1912, and without notice, warning or order to plaintiff in error, this suit was commenced in the District Court of Wyandotte County, Kansas, by order of the Public Utilities Commission in the name of the State of Kansas and on the relation of the attorney for the Commission as authorized by said Act of 1911, to enjoin the plaintiff in error from collecting said contract rate, and for the reason that it was made unlawful by said Act of 1911 to charge said contract rate, it being "a greater compensation for said service than the charge fixed on the lowest schedule of rates for the same services on the 1st day of January, 1911."

Thereafter a final judgment was rendered on the case made by the pleadings, enjoining said contract rates until consented to by the Public Utilities Commission.

The Company appealed to the Supreme Court of the state, and that court affirmed the judgment of the trial court, holding that the collection of the rates fixed in the franchise contracts was unlawful without the consent of the Public Utilities Commission under the Act of 1911. Thus, the court of last resort of the state gave force and effect to a legislative Act of the state impairing the obligations of contracts.

Therefore it is clearly apparent that, except for the Act of 1911, the rates fixed in the franchise contracts dated 1904

and 1905 would not be "unlawful," and no suit could have been maintained to enjoin the same either by the State or its said municipalities.

Plaintiff in error confidently asserts that under this state of the record a federal question is properly presented. This federal question can properly appear only upon an examination of the entire record (which the defendant in error has neglected to order printed for the purposes of this motion), for the federal question may appear upon the record even though there are no specific allegations thereof. It is sufficient if legislation has been given force and effect by the judgment of the highest court of the state in which the matter could be decided which act impairs the obligation of a contract.

However, the record is not wanting in specific allegations showing that the whole case below hinged upon the federal question.

It appears on the face of the record in the following particulars:

The suit was prosecuted in the name of the State of Kansas. The petition alleged the organization and existence of the Public Utilities Commission; that the Commission had ordered its attorney to commence and prosecute this suit to enjoin and restrain defendant from advancing the price of natural gas to consumers thereof; that the Wyandotte County Gas Company is a public utility and is now and for more than two years last past has been engaged in the conveyance of gas through pipe lines in and through the cities of Rosedale and Kansas City, Kansas, and in supplying and delivering natural gas to said cities and the inhabitants thereof; that on the 1st day of January, 1911 (the date named in Section 30 of the Public Utilities Act of 1911), the said defendant was charging domestic consumers of natural gas in said cities the sum of 25 cents per thousand cubic feet; that no application had been made or presented to or filed with the Public Utilities Commission of the

State of Kansas by the said defendant for permission to increase the price of natural gas to the consumers thereof in said cities; that said Commission has not in any way consented to, permitted or ordered any advance or other change whatever in the price to be paid for natural gas by the consumers thereof in said cities; that the defendant had wrongfully and unlawfully (only by virtue of said Act of 1911) advanced and increased the price to be paid by consumers of natural gas in said cities from 25 cents to 27 cents per thousand cubic feet, and is now collecting the said price of 27 cents per thousand cubic feet from consumers thereof in said cities, and will continue so to collect the same unless enjoined and restrained from so doing.

Wherefore, plaintiff prays that said defendant be perpetually enjoined and restrained from advancing the price of natural gas to consumers thereof in Kansas City and Rosedale, Kansas, or collecting a greater price than was collected on January 1, 1911 (the date of the inhibition of the Act of 1911), until consent to such increase or permission therefor shall have been obtained from the Public Utilities Commission of the State of Kansas as is provided by law (the Act of 1911).

The temporary order of the trial court restrained the defendant from collecting a greater price than was collected on January 1, 1911, until the further order of this Court or until said defendant shall have obtained from the Public Utilities Commission of the State of Kansas consent or permission to so increase the price of natural gas (as required by the Act of 1911).

The demurrer to the petition stated, among other grounds, that "The court has no jurisdiction of the subject of the action, to-wit, fixing the price of gas, the same having been fixed by ordinance and *contract* between the cities of Kansas City and Rosedale and the defendant herein." Said demurrer was overruled and effect given to the Act of 1911 by the trial court.

The answer alleged the entering into of the franchise contracts prior to said Act relating to public utilities; that said contracts definitely fixed the prices of natural gas for a period of twenty years; that the Company was furnishing said gas to the city of Kansas City, Kansas, under and pursuant to authority so to do duly granted by Ordinance No. 6051 of the city of Kansas City, Kansas, and the acceptance thereof, true and correct copies thereof being attached and made a part of the answer; and that it was furnishing and supplying gas to the city of Rosedale and its inhabitants under and pursuant to contract between said city of Rosedale and this defendant, authority so to do duly granted by Ordinance No. 295 of said city of Rosedale, true and correct copy thereof being attached and made a part thereof; and that,

> X. "For a third and further answer and defense to the plaintiff's petition the defendant alleges and charges the fact to be that, as will hereinafter more fully appear, the present net price of twenty-seven cents per thousand cubic feet for the natural gas now furnished by defendant to domestic consumers in Kansas City and Rosedale, Kansas, complained of in the plaintiff's petition, was, on said January 1, 1911, and long prior thereto had been, duly fixed by contract embodied in and evidenced by said Ordinances Nos. 6051 of Kansas City, Kansas, and 295 of Rosedale, Kansas; and that no order of the Public Utilities Commission of Kansas could issue to charge or fix any other compensation for the service rendered by this defendant to its patrons, to-wit, the price of natural gas, under and pursuant to said Act relating to Public Utilities without impairing the obligations of said contracts, and taking the defendant's property in said contracts without due process of law, and denying to this defendant the equal protection of the laws."
>
> XV. "Defendant further alleges that the present net price of twenty-seven cents per thousand cubic feet for natural gas furnished by this defendant to domestic consumers in Rosedale, Kansas, was, on said January 1, 1911,

duly fixed and determined by Section 2 of said Ordinance No. 295 of Rosedale, Kansas, which reads as follows:

'SEC. 2. Under the authority hereby granted, the said grantees shall furnish gas to the said city and its inhabitants at a rate which for natural gas shall not for the first five years next ensuing after the acceptance of this ordinance by the grantees exceed thirty-five (35) cents for each one thousand (1,000) cubic feet, and for the remaining years that the said grantees shall furnish natural gas under this ordinance grantees shall furnish such natural gas at a rate not to exceed forty (40) cents for each one thousand (1,000) cubic feet; provided, however, that the said grantees may charge a minimum rate of fifty (50) cents per month for service, said minimum rate to be deducted from the monthly gas bills when the same are in excess of fifty (50) cents and shall be the only charge when the monthly gas bill is for a less amount than fifty (50) cents; and provided further that the said grantees, their successors and assigns, shall not at any time during the life of this franchise, charge or collect, from the citizens or inhabitants of said city, any greater charge or price for either natural or manufactured gas than is charged or collected therefor, for like service, during the same period, in Kansas City, Kansas.'"

XIX. "For a further and seventh answer and defense to the plaintiff's petition defendant alleges that, by reason of the premises, the said Act relating to public utilities and the construction placed thereon by plaintiff and relator herein and the commencement and prosecution of this suit are each and all in conflict with and in violation of the following provisions of the Constitution of the United States, to-wit:

(a) Sec. 10 of Art. 1: 'No state shall * * * pass any law impairing the obligations of contracts.'

(b) Art. 5, Amendments: 'No person shall * * * be deprived * * * of property without due process of law; nor shall private property be taken for public use without just compensation.'

(c) Art. 14 of Amendments: 'No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any

state deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

XX. "Defendant further alleges that by reason of the premises, the construction placed upon said Act relating to public utilities by the plaintiff and relator herein, the commencement and prosecution of this suit and the issuance of the restraining order herein, it has been damaged in the sum of approximately $6,000.00, and that it will suffer great and irreparable damage by reason thereof during the pendency of this suit, the exact amount of which this defendant is unable to state, but alleges in the sum of approximately $50,000.00, and that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00."

The final decree in the trial court enjoined defendant from collecting the contract price by increasing the price for said natural gas to the consumers thereof in Kansas City and Rosedale, Kansas, from 25 cents to 27 cents per thousand cubic feet, and from "collecting a greater price than was collected on January 1, 1911," to-wit, 25 cents per thousand cubic feet.

The Company assigned as error in the Supreme Court of the State the final judgment, "enjoining the defendant from collecting the *contract* price for natural gas."

The judgment of the State Supreme Court, 88 Kan. 165, further discloses the federal question in the following excerpts from the opinion, to-wit:

This action was brought to enjoin the appellant gas company from increasing the rate charged for gas in Kansas City and Rosedale from 25 to 27 cents per thousand cubic feet without any order from the Public Utilities Commission authorizing such advance (citing Sec. 30 of the Act of 1911).

In defense the appellant alleged that under ordinances duly passed by the mayor and council of the respective cities in 1904 and 1905 it was authorized to advance the rate as

alleged; that the appellant accepted such ordinances which thereby became *contracts inviolate;* that the appellant charged the rate of 25 cents per thousand cubic feet for gas in the respective cities from the time of the enactment of said ordinances until November 19, 1911, from and after which date it advanced the rate to 27 cents *as by the terms of the respective ordinances it was entitled to do.*

Two principal questions are involved in the decision of the case: First, Has the Public Utilities Commission any jurisdiction to regulate and control the rates for gas in the respective cities? (Here follows an interpretation and application of the Act territorially.) The remaining question is whether Ordinance No. 6051 of Kansas City *became,* upon the acceptance thereof by the appellant, *a contract binding upon the city as it purports to be,* for a period of twenty years after the passage and publication thereof. After citing authorities, the court's decision is in favor of the validity of the Public Utilities Act of 1911, and against the contracts of 1904 and 1905, which it impairs, as follows:

> "We conclude that by the provisions of Chapter 122 of Laws of 1903 the mayor and council of Kansas City were not authorized to contract with the appellant the rates for supplying gas to the city or its inhabitants for a period of twenty years, or for any term; that without such authority no such contract is valid; that though Chapter 136 of the Laws of 1903 did authorize the mayor and council of Rosedale to make such contract and they did make such contract, the contract was limited by the provision in the ordinance that no higher rate should be charged in Rosedale than in Kansas City; that the appellant had no right to raise the rate from 25 to 27 cents on November 19, 1911, without the consent of the Public Utilities Commission (as required by Section 30 of the Public Utilities Act of 1911).
>
> The judgment in this case purports to be a perpetual injunction prohibiting the appellant from raising the rate in either city from the rate collected January 1, 1911. It

is conceded by the appellee that the rate may be raised if consent or permission therefor be given by the Public Utilities Commission of the State of Kansas. As we have seen, no valid contract exists between the appellant and Kansas City, and hence the rate for gas therein may be increased by the appellant to whatever sum per thousand cubic feet shall receive the consent and approval of the Public Utilities Commission. In Rosedale, however, a contract authorized by law exists, and such contract, with the limitations therein provided, must govern any advance in that city.

It is therefore ordered that the judgment be modified as indicated herein and as so modified it is affirmed."

The arguments and briefs of both parties in the State Courts were devoted primarily to the federal question growing out of the contracts between the cities of Rosedale and Kansas City and the Company, and their impairment by the Act of 1911. (See Brief, pp. 54 to 113.)

The validity of the Act of 1911 was again drawn in question on the petition for rehearing, as follows:

"And now comes the above named appellant, The Wyandotte County Gas Company, and moves the court for a reconsideration and rehearing of the above entitled cause, for the reason that manifest error has been committed in the following particulars, to-wit:

1. In holding that no valid contract exists between appellant and Kansas City for the furnishing of natural gas to said city and its inhabitants under Ordinance 6051 of said city and its acceptance.

2. In holding that the Public Utilities Act, Chapter 238, Laws of 1911, does not impair said contract under Sec. 10, Art. 1, of the Constitution of the United States.

3. In holding that said Public Utilities Act does not take appellant's property in said contract, franchises and the gas plant constructed thereunder without due process

of law under the 5th and 14th Amendments of said Federal Constitution.

4. In holding Sec. 51, Chapter 122, Laws of 1903, relating to manufactured gas plants and authorizing the mayor and council to prescribe and fix maximum rates and charges and to regulate the collection of the same, as applicable to or a limitation upon the authority and power to grant franchises and contract for natural gas.

5. In holding Section 170, Chapter 122, Laws of 1903, relating to manufactured gas franchise grants and providing that 'the mayor and council of any such city shall at all times during the existence of such grant, contract or privilege have the power by ordinance to fix a reasonable schedule of maximum rates,' as applicable to, authority for or a limitation upon the power of the mayor and council to grant a franchise and contract for natural gas under Section 170a of the same Act, providing that 'Nothing' in the entire 'Act' shall be construed as prohibiting the city from granting a franchise to construct, maintain and operate a 'natural gas plant' and to lay and maintain all necessary mains and pipes in the streets for the purposes of furnishing to said city and its inhabitants 'natural gas' 'on such terms and conditions as may be agreed to' by the mayor and council and the grantee, provided only that such 'franchise' shall not continue for a longer period than twenty years.

6. In construing said Public Utilities Act so as to render the same unconstitutional as taking appellant's property without due process of law.

7. In construing the Public Utilities Act so as to render the same unconstitutional as denying to appellant the equal protection of the laws.

8. In holding that the 27-cent rate for natural gas duly fixed by ordinance in 1904 was not 'fixed' as the 'lowest schedule of rates for such service on the 1st day of January, 1911,' as required under Section 30 of said Public Utilities Act."

Finally, the writ of error was allowed and supersedeas approved by the Chief Justice of the State Supreme Court for the very apparent reason that the whole case below hinged on a federal question.

Thus, we see from the record that the complaint of the State, the demurrer thereto, the answer of the defendant, the temporary injunction and final judgment in the trial court, the briefs and arguments of counsel, the petition for rehearing, and the opinion and final judgment of the State Supreme Court each and all directly and specifically at every stage of the proceedings present a federal question; and the writ of error in this case invokes the appellate jurisdiction of this Court to review a final judgment and decree rendered in a suit in the highest court of the state in which a decision in the suit could be had where is drawn in question at every stage of the proceedings the validity of a statute of and an authority exercised under the State, on the ground of their being repugnant to the Constitution of the United States, and the decision in said suit is in favor of their validity. This is the jurisdictional requirement of the federal statute.

Now, counsel for defendant in error contends that no federal question is presented because, forsooth, in spite of the facts above enumerated clearly appearing on the face of the record the State Court held as incidental to its final judgment enforcing the Act impairing the contracts, that no contracts exist for want of authority in the cities to make the same in the first instance, concluding, therefore, that no federal question is presented. If such were the law, no writ of error could ever issue to a state court, except at the will and pleasure of that court.

We therefore desire to present the following authorities in support of the proposition that this Court, in determining its jurisdiction, is not bound by the decision of the State Court, and will, for itself, decide whether or not a contract exists

which is claimed to be impaired by state legislation, which is given effect by a judicial decree of the State Courts.

This question was settled by this Court in *McCullough* v. *The Commonwealth of Virginia*, 19 Sup. Ct. Rep. 134, 172 U. S. 102. In that case the Commonwealth in 1871 refunded its debt and authorized the issuance of coupon bonds which were receivable on and after maturity for taxes, debts due and demands of the state. Thereafter the General Assembly passed several Acts culminating in a provision that only lawful money of the United States was receivable for taxes and demands due the Commonwealth. In a suit prosecuted by a coupon holder to establish the genuineness of certain coupons tendered in payment of taxes, on appeal to the Supreme Court of Appeals of that state a judgment was rendered in favor of the Commonwealth dismissing the plaintiff's petition and holding that the original statute authorizing the issuance of the coupons was void. The case came to this Court on writ of error, where a motion to dismiss for want of a federal question was overruled; this Court held (Syllabus 2):

> "Whether or not a state statute creates a valid contract is a question upon which the Supreme Court is not bound by the decision of the Supreme Court of the state in a suit in which such contract is claimed, and the question of the impairment of its obligation by subsequent legislation is involved."

Mr. Justice Brewer so thoroughly reviews the cases and anaylzes the question raised on this motion to dismiss that we offer the following excerpts from the opinion of that able jurist in that case:

> "It is insisted that, whatever may be our own opinions upon the case, we are to take the construction placed by the Court of Appeals of Virginia upon the Act as the law of that state. While it is undoubtedly the

general rule of this court to accept the construction placed by the courts of a state upon its statutes and Constitution, yet *one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired.* (Our italics.) This was distinctly affirmed in *Bank* v. *Skelly*, 1 Black. 436, 443, in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract, and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could with fidelity to the Constitution of the United States follow the construction of the Supreme Court of a state in such a matter, when it entertained a different opinion.' The doctrine thus announced has been uniformly followed. *Bridge Proprietors* v. *Hoboken Co.*, 1 *Wall.* 116, 145; *Wright* v. *Nagle*, 101 U. S. 791, 793; *McGahey* v. *Virginia*, 135 U. S. 665, 667, 10 Sup. Ct. 972, 974, in which, in reference to this very contract, it was said: 'In ordinary cases the decision of the highest court of a state with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the Acts of Congress relating to writs of error to the judgments of state courts, to inquire and

judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto.' See, also, *Douglas* v. *Kentucky*, 168 U. S. 488, 501, 18 Sup. Ct. 199, and cases cited therein.

It is urged that this court has no jurisdiction of this case, for the reason that the Court of Appeals in its opinion does not consider the subsequent legislation passed by the state with the view of impairing the contract created by the Act of 1871, but limits itself to a consideration of that Act, and adjudges it void In support of this proposition the rule laid down in *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 38, 8 Sup. Ct. 741, reaffirmed in *Huntington* v. *Attrill*, 146 U. S. 657, 684, 13 Sup. Ct. 224, and *Bacon* v. *Texas*, 163 U. S. 205, 216, 16 Sup. Ct. 1023, 1027, is cited.

In this last case the doctrine is summed up in the following statement: 'Where the federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court by some subsequent statute of the state which has been upheld or effect given it by the state court. *Water Co.* v. *Easton*, 121 U. S. 388, 7 Sup. Ct. 916; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741; *Land Co.* v. *Laidley*, 159 U. S. 103, 109, 16 Sup. Ct. 80. * * * If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract. The above cited cases announce this principle.'

It is true, the Court of Appeals in its opinion only incidentally refers to statutes passed subsequent to the Act of 1871, and places its decision distinctly on the ground that that Act was void insofar as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly held by this court that in reviewing the judgment of the courts of a state we

are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision.

Suppose, for illustration, a state Legislature should pass an Act exempting the property of a particular corporation from all taxation, and that a subsequent Legislature should pass an Act subjecting that corporation to the taxes imposed by the city in which its property was located, and that on the first presentation to the highest court of the state of the question of the validity of taxes levied under and by virtue of this last Act that court should, in terms, hold these city taxes valid notwithstanding the general clause of exemption found in the prior statute. In that event no one would question that this court had jurisdiction to review such judgment, and inquire as to the scope of the contract of exemption created by the first statute. Suppose, further, that this court should hold that the first statute was valid and broad enough to exempt from all taxation, city as well as state, and adjudge the last Act of the Legislature void as in conflict with the prior, and that thereafter the city should again attempt to levy taxes upon the corporation, and that upon a challenge of those taxes the state court should say nothing in respect to the last Act, but simply rule that the original Act exempting the property of the corporation from taxation was void, could it fairly be held that this court was without jurisdiction to review that judgment—a judgment which directly and necessarily operated to give force and effect to the last statute subjecting the property to city taxes? Could it be said that the silence of the state court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction. Such certainly has not been the understanding, and such certainly would seem to set at naught the purpose of the federal Constitution to prevent a state from nullifying by its legislation a contract which it has made, or authorized to be made. In *Hickle* v. *Starke*, 1 Pet. 94-98, Chief Justice Marshall, delivering the opinion of the court, said:

'In the construction of that section (the twenty-fifth) the court has never required that the treaty or Act of Congress under which the party claims who brings the final judgment of a state court into review before this court should have been pleaded specially, or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case that the record should show a complete title under the treaty or Act of Congress, and that the judgment of the court is in violation of that treaty or Act.'

And in *Willson* v. *Marsh Co.*, 2 Pet. 245, 250, the same chief justice also said:

'But we think it impossible to doubt that the constitutionality of the Act was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided. * * * This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Miller* v. *Nichols*, 4 Wheat. 311, and *Williams* v. *Norris*, 12 Wheat. 117, are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the twenty-fifth section of the Judicial Act if the record shows that the Constitution or a law or a treaty of the United States must have been misconstrued, or the decision could not be made; or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law.'

In *Satterlee* v. *Matthewson*, 2 Pet. 380, 410, Mr. Justice Washington observed: '* * * If it sufficiently appear from the record itself that the repugnancy of a statute of a state to the Constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the Act referred to, although the record should not, in terms, state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute of the state to any part of that Constitution was drawn into question.'

In *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 143, an Act passed by the state in 1860 was claimed to be in violation of a contract created by an Act of 1790, and it was said:

'Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular Act of Congress on part of the Constitution supposed to be infringed by the state law ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. * * * It is said, however, that it is not the validity of the Act of 1860 which is complained of by the plaintiffs, but the construction placed upon that Act by the state court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state Legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases.'

There are also some cases involving alleged contract exemptions from taxation which are worthy of notice. In *Given* v. *Wright*, 117 U. S. 648, 655, 6 Sup. Ct. 907, the plaintiff in error claimed to hold real estate exempt from taxation by virtue of a contract alleged to have been contained in a law of the New Jersey colonial Legislature passed August 12, 1758. The validity of the exemption had been sustained in *New Jersey* v. *Wilson*, 7 Cranch. 164, notwithstanding which for about sixty years before the assessment in question was laid taxes had been regularly assessed upon the land, and paid without objection. The highest court of New Jersey upheld the tax on the ground that the long acquiescence of the land owners raised a presumption that the exemption which had once existed had been surrendered. The jurisdiction of this court to review such judgment was sustained, the court saying:

'Where it is charged that the obligation of a contract has been impaired by a state law, as, in this case, by the general tax law of New Jersey as administered by the state authorities, and the state courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection.'

In *Railroad Co.* v. *Thomas*, 132 U. S. 174, 184, 10 Sup. Ct. 68, 72, the plaintiff in error was given by its charter, which became a law on February 17, 1882, a certain exemption from taxation. In 1888 the Legislature passed an Act for the collection of taxes for past years, which, by its terms, was not applicable to railroad companies exempt by law or charter from taxation. The Supreme Court of the state held that the plaintiff was not entitled to the benefit of the exemption named in the Acts of 1888. The jurisdiction of this court to review that judgment was challenged. But the court, by the chief justice, said:

'Although by the terms of the Act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the Act; so that, if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the Act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the company. The result is the same, although the Act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for, if the contract existed, those laws became inoperative, and would be reinstated by the Act of 1888. The motion to dismiss the writ of error is therefore overruled.'

In *Railroad Co.* v. *Alsbrook*, 146 U. S. 279, 293, 13 Sup. Ct. 72, 75, the state court, conceding the validity of a contract of exemption from taxation, held that certain property was not within its terms, and on this ground a motion to dismiss the writ of error was made by the defendant. In respect to that the chief justice said:

'The jurisdiction of this court is questioned upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the Act of 1834, but denied that particular property was embraced by its terms; and that, therefore, such decision did not involve a federal question.

'In arriving at its conclusion, however, the state court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law; and, as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed.'

In *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486, 492, 493, 14 Sup. Ct. 968, 976, Mr. Justice Jackson, reviewing prior decisions, said:

'It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract, in cases like the present, is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation.'

In the case before us, after the Act of 1871 and in 1872, the General Assembly passed an Act requiring that all taxes should be paid in 'gold or silver coin, United States treasury notes, or notes of the national banks of the United States'; and again, in 1882, a further statute commanding tax collectors to receive in payment of taxes 'gold, silver, United States treasury notes, national bank currency, and nothing else.' This command was re-enacted in the Code of 1887. Under these statutes the state demanded payment of its taxes in money, and repudiated its promise to receive coupons in lieu thereof. True, *in its opinion, the Court of Appeals did not specifically refer to these statutes, but, by declaring that the contract pro-*

vided for in the Act of 1871 was void, it did give full force and effect to them (our italics), as well as to the general revenue law of the state. Now, it is one of the duties cast upon this court by the Constitution and laws of the United States to inquire whether a state has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a state court expresses its conclusions to override the necessary effect of its decision."

In the recent case of *Cross Lake Shooting and Fishing Club* v. *State of Louisiana*, 32 Sup. Ct. Rep. 577, 224 U. S. 632, the rule applicable to the case at bar was again very clearly announced by this Court. In that case the Louisiana Legislature created the Caddo Levy District, defined its boundaries, vested the control and management of its affairs in a board of commissioners, clothed the board with corporate powers, and granted it certain state lands known as swamp lands and other lands sold for taxes; but provided that the lands should be conveyed to the board by an instrument executed by the state auditor or the register of the state land office and recorded in the recorder's office of the parish. The board of commissioners afterwards sold and delivered possession of certain of said lands to the grantors of the shooting club, but the board never procured the conveyance required by law from the auditor or register of the land office; thereafter the Legislature passed an Act authorizing the register of the land office to sell these lands at not less than $5.00 per acre in given quantities. The State of Louisiana sued in ejectment to recover possession of the lands held by the shooting club on the ground that the levy board had never acquired title and therefore could not convey the same for the reason that the auditor and register of the parish had not executed the proper instrument of conveyance and filed the same in the recorder's office of the parish as required by law.

The club answered that the Act creating the board *per se* vested title to the lands in the board without any conveyance from the auditor and register, and that the fishing club's grantor purchased on the faith of that Act. No reference was made to the subsequent Act of 1902 repealing the Act of 1892 and authorizing the sale of the lands in question. The court very properly held that the case was decided by the state court upon the regularity of the title in the levy board, an ordinary case of ejectment, on superiority of titles. The Act of 1892 authorizing the sale of the lands was not drawn in question and could not properly be involved in the suit. Yet out of precaution this Court said in the opinion:

> "But when the state court either expressly or by necessary implication gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it and whether they are impaired by the subsequent law. But if there be no such law or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract, and this is true even where it is asserted, as it is here, that the judgment is not in accord with the prior decisions on the faith of which the rights in question were acquired."

The foregoing authorities leave no room for doubt of the jurisdiction of this Court and the right of plaintiff in error to maintain this suit.

The great majority of cases that come before this Court on writ of error to the state courts are cases involving alleged *ultra vires* contracts entered into by subordinate agencies of the states and vested rights acquired under authority of the Acts of such subdivisions. The pivotal question raised in all

such cases is whether or not the agent had sufficient authority to enter into the contract or grant the privilege resulting in the vested right; whether or not the Act or contract is *ultra vires*. The fact that subsequent legislation, either of the state or its municipalities, impairs the contract or deprives the party of his property and vested rights is usually admitted, as in the case at bar. Counsel do not and cannot truthfully contend that the Act of 1911, requiring the consent of the Public Utilities Commission before plaintiff in error can charge the rates agreed upon in 1905, and the effect given to that Act by the decision below, does not impair said contract and deprive plaintiff in error of its property and vested rights acquired thereunder.

If the holdings of this Court should place it in the power of the state courts to determine this Court's jurisdiction in such matters, this Court would soon become badly affected with self-inflicted obsolescence.

The motion and brief of defendant in error offer no reasons or argument why the case should be advanced under Rule 26 of this Court. We fail to see in what particular this case differs from the great majority of cases coming before this Court demanding any special setting out of the regular order. Counsel for defendant in error have doubtless recognized the same fact, and therefore abandoned that part of their motion.

Counsel for defendant in error indulges in such indiscriminate citation of authorities that it is a waste of time to more than mention the points sought to be made.

Part "I" is devoted to the proposition that this Court is a court of limited jurisdiction. No one controverts that question.

Part "II" is to the effect that the record must disclose a federal question, another uncontroverted proposition; but we respectfully submit that it is quite presumptive on the part of counsel for defendant in error to expect this Court to find as

a matter of fact that there is no federal question in the case without printing the record, as required by the practice in this Court.

Again, counsel seems to argue that there is no federal question presented because plaintiff in error challenged specifically the constitutionality of Sec. 30 of Chapt. 238, Laws of 1911, and did not attack the whole Act "generally." It requires no citation of authority to satisfy this Court that any legislative Act may be constitutional in part, and unconstitutional in part, or constitutional when given one construction and unconstitutional when given another.

> "As one section of a statute may be repugnant to the Constitution without rendering the whole Act void, so one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity." (*Loeb* v. *Columbia Twp.*, 179 U. S. 472, 490, 21 Sup. Ct. Rep. 174, 181.)

That is the situation in the case at bar.

Part "III" of the brief of defendant in error is an extravagant conclusion, and cannot be sustained by the record. Counsel assert that, "The decision of the Supreme Court in this case, upon independent grounds not involving the federal question, is broad enough to sustain the judgment for which reason the writ of error should be dismissed or the judgment affirmed." As heretofore pointed out and as shown by the record, the cause of action set forth in the plaintiff's petition—the offense charged in the State's suit—was charging the contract price without the consent of the Public Utilities Commission, which was made an offense, declared "unlawful" under Sec. 30 of said Public Utilities Act of 1911. Except for that Act no state case could have been

commenced or maintained, no offense could have been charged and no judgment rendered below.

Part "IV" of the brief of defendant in error is a repetition of Part "III," and a great number of cases are cited indiscriminately in support of a contention that, where a state court decides a case on two separate grounds, one federal and the other non-federal, and the state court may maintain its decision on the non-federal ground, this Court will not review the federal question. There can be no controversy about that proposition—it is like setting up nine pins and knocking them down again. No issue is joined upon it.

Counsel say: "The Public Utilities Act is really not connected with this case. Its passage was not necessary to this decision. And under the original Act, *i. e.*, Ch. 122, Laws of 1903, the same decision would have been made." The most charitable view we can take of this statement is that counsel intend it as a conclusion and not made in lieu of the printed record. How can counsel say to this Court that the Public Utilities Act "is not connected with this case," when the cause of action alleged in the plaintiff's petition is bottomed on the sole fact that the plaintiff in error was charging the contract price without the consent of the Public Utilities Commission, which was made "unlawful" by that Act? Again, counsel say: "Its passage was not necessary to this decision." No suit could have been filed, a paper-case could not be stated, and no decision made in this case without the passage of the Utilities Act, for the offense charged and enjoined was the charging and collecting of a "greater rate than the rate in force on the 1st day of January, 1911," "without the consent of the Public Utilities Commission," which charging and collecting was made "unlawful" by the passage of the Public Utilities Act.

Again, counsel say, "And under the original Act, *i. e.*, Ch. 122, Laws of 1903, the same decision would have been made."

This is a conclusion founded neither in fact nor law. No suit could have been maintained under Ch. 122, Laws of 1903, either in the name of the State or by the city, and no decision could have been made enjoining plaintiff in error from charging the rates authorized by Ordinance 6051 of Kansas City, Kansas, granted by the mayor and council who were authorized to agree on terms.

Counsel for defendant in error cite *Bacon* v. *Texas*, 163 U. S. 207, 16 Sup. Ct. Rep. 1023, apparently without reading the decision and presumably in support of the contention that this Court will not determine for itself that a contract exists and a subsequent legislative Act impairing it, has been given effect by the decision of the State Court. The quotation given is taken from two separate parts of the opinion and omits the essential parts, but even at that is diametrically opposed to counsel's contention. That case involved land grants in the state of Texas claimed to have been made under a statute authorizing the same. The suit was prosecuted by the state to recover possession of 300,000 acres which defendants had unlawfully entered upon and dispossessed the state. There was no subsequent legislative Act sought to be enforced in the suit at all. The state was merely trying to repossess itself of lands wrongfully withheld by persons claiming to have complied with strict statutory requirements and regulations essential to acquiring title to the public domain. Numerous findings of fact and conclusions of law were made sufficient to sustain the judgment of the state court, to-wit: that Bacon and Graves were not responsible parties within the meaning of the statute; that they had not complied with the law essential to acquire title; that the surveys required by law were not made and were totally inaccurate; that Bacon and Graves had never paid or offered to pay for the land as required by the statute until after it was repealed; that at the time Graves entered into an

agreement with Bacon to purchase the lands, he was an employee of the general land office, and his action was against the civil and criminal laws of the state.

This Court held that the judgment of the state court gave no effect to the subsequent statute, but merely adjudged that plaintiff in error had not complied with the requirements of the original statute to acquire title to the land in question. In the opinion the Court said:

> Our only right to review it (the state court's judgment) depends upon whether there is a federal question in the record which has been decided against the plaintiffs in error. Revised Statutes, Sec. 709.
>
> Where the federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired, within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, *by some subsequent statute of the state which has been upheld, or effect given it, by the state court.* *Water Co.* v. *Easton*, 121 U. S. 388, 7 Sup. Ct. 916; *New Orleans Water Works Co.* v. *Louisiana Sugar-Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741; *Land Co.* v. *Laidley*, 159 U. S. 103-109, 16 Sup. Ct. 80. As stated in the case reported in 125 U. S., and 8 Sup. Ct., *supra*, it is not necessary that the law of a state, in order to come within this constitutional prohibition, should be either in the form of a statute enacted by the Legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the state as their fundamental law. A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the Legislature to the corporation, as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States.
>
> If the judgment of the state court gives *no effect* to the subsequent law of the state, and the state court decides

the case upon grounds *independent of that law*, a case is not made for review by this court upon any ground of the impairment of a contract. The above cited cases announce this principle. The case of *Railroad Co.* v. *Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, decides nothing that is repugnant to it. In that case the jurisdiction of this court was questioned on the ground that the contract of exemption mentioned in the Act of 1834 was acknowledged to be valid by the Supreme Court of North Carolina, and it simply denied that particular property was embraced by its terms; and, as a consequence, it was claimed that the decision did not involve a federal question. To which this court replied, speaking by Mr. Chief Justice Fuller, as follows: *'In arriving at this conclusion, however, the state court gave effect to the Revenue Law of 1891*, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law; and *as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed.'*

So in *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486, 14 Sup. Ct. 968. In that case it was contended that this court had no jurisdiction to review the judgment of the Supreme Court of Tennessee, *because the decision of that court proceeded upon the ground that there was no contract in existence, between the railroad company and the state, to be impaired*, and that the supposed contract was in violation of the State Constitution of 1834, and hence not within the power of the Legislature to make. *In truth, however, the court, in its decree, gave effect to the subsequent statute of Tennessee, which it was claimed impaired the obligation of the contract entered into between the state and the railroad company; and under those circumstances this court exercised jurisdiction to review the decision of the state court on the question as to whether there was a contract or not, and as to the meaning of the contract, if there were one, and whether it had been impaired by the subsequent legislation to which effect had been given.*

Both these cases have been cited by the counsel for plaintiffs in error as authorities for the jurisdiction of the court in this case. Inasmuch as the judgments of the state courts, in both cases, *gave effect to the later statutes*, they are governed by the principle set forth in 125 U. S.,

8 Sup. Ct., and 159 U. S., 16 Sup. Ct., *supra*. It becomes necessary, therefore, in the examination of this case, to inquire whether the federal question has been raised in the courts of the state, and, if so, whether the judgment of the state court *is founded upon, or in any manner gives the slightest effect to, the subsequent Act of 1883.*

The statement of facts already given shows that the only allusion made to the Act of 1883 in the pleadings was made by the defendants. No claim was made by the plaintiff, the state of Texas, by either of its pleadings, of any right accruing to it by virtue, or under the provisions, of the last named Act. (In the case at bar judgment is given to enjoin an Act authorized by contract but made unlawful by subsequent legislation.) The trial court, in its findings, sets forth at length and in detail the various times in which the surveys were made, and the field notes filed, of the lands in question, and then states that none of the land in suit was actually surveyed upon the ground by the deputy surveyors who purported to have done so, but they merely copied in the office of the surveyor of the Palo Pinto land district the field notes of the Elgin survey. What that Elgin survey was is also set forth in the foregoing statement, and upon these facts the court found, as a conclusion of law, that the defendants did not comply with the law, by having the land surveyed as was required by it, and therefore could not purchase such land. Assuming there was a federal question properly raised, we also find in the record a *broad and comprehensive holding that the defendants never complied with the Act of 1879*, and never made the surveys necessary to be made under the laws of Texas in order to vest them with any rights whatsoever under that Act. This ground of judgment is founded upon a matter of state law, and makes no reference whatever to any subsequent Act of the Legislature, and in no way upholds that Act, or treats it as of the least force or virtue, any more than if the Act had never been passed. If it never had been passed, and the defendants had made this same claim of having a contract for the purchase of the lands by reason of the things done under the Act of 1879, and the court had decided upon their claim in the same way it has done in this case, it is beyond question that this court would have no jurisdiction to review that decision

of the state court, however erroneous it might be regarded by us.

The case is not altered by the fact that the state has passed an Act which the defendants assert impairs the obligation of their contract, so long as the court, in deciding their case, holds that they never had a contract, because they never had complied with the provisions of the original statute, and so long as it gives judgment wholly without reference to the subsequent Act, and without upholding, or in any manner giving effect to, any provision thereof. (In the case at bar plaintiff in error is enjoined from collecting any greater rate for gas than was charged on January 1, 1911, as required by the Public Utilities Act.)

Whether the statute of 1879 permitted a survey to be adopted from a survey which had previously been made in the field, or whether it did not, was a case of construction of a state statute by the state court. It is not one of those cases where this court will construe the meaning of the state statute for itself. *This court, even on writ of error to a state court, will construe for itself the meaning of a statute, as affecting an alleged contract, where it is claimed that a subsequent state statute passed by the state has impaired the obligations of the contract as claimed by the party, and where such subsequent statute has, by the judgment of the state court, in some way been brought into play, and effect been given to some or all of its provisions.* In *such* a case *this court construes the contract*, in order to determine whether the later statute impairs its obligation. *Louisville Gas Co.* v. *Citizens' Gaslight Co.*, 115 U. S. 683, 697, 6 Sup. Ct. 265. This is not such a case. The later statute is not given effect by the judgment of the court.

(Counsel neglected to cite the foregoing important parts.)

So in the case at bar, in the language of the court, *supra*: in truth the court, in its decree, gave effect to the subsequent statute of Kansas, which it is claimed impairs the obligation of the contract entered into between the State, through its municipalities, and the Gas Company; and under these circum-

stances this Court will exercise jurisdiction to review the decision of the state court as to whether there was a contract or not and as to the meaning of the contract if there was one and whether it has been impaired by the subsequent legislation to which *effect has been given* by the judgment of the state court enjoining the contract rates, made unlawful by the Act of 1911.

Berea College v. *Ky.*, 211 U. S. 54, 29 Sup. Ct. Rep. 33, is cited by counsel for defendant in error. That was a case involving the mixed school law of Kentucky, prohibiting the teaching of white and negro pupils in the same institution. There was no jurisdictional question raised in the case. This Court merely held that the state of Kentucky had passed an Act in the exercise of its police powers which was enforceable in the courts of the state without infringing upon the Constitution of the United States. This Court did not decline to review the case; in fact, the opinion of the Court shows that the case was reviewed and the judgment of the state court affirmed. This Court merely declining to "disturb" the judgment of the state court on a non-federal question merely because there was also a federal question raised in the case. This rule conforms to common sense and reason. The Court will not do an idle thing. It would be an idle ceremony for this Court to reverse a state court on a federal question incidentally raised in a case where the state court could enforce its own judgment on the non-federal question.

Seneca Nation of Indians v. *Christy*, 162 U. S. 284, 16 Sup. Ct. Rep. 829, is also cited by defendant in error. This case has no application at all. It merely holds that when an Indian tribe avails itself of the privilege given by a state statute to maintain suits in the state courts in the tribal name, such tribe is bound by a limitation in the statute as to the time in which the suit much be brought.

Pierce et al. v. *Summerset Ry.*, 19 Sup. Ct. Rep. 64, cited by defendant in error, is a case where there was a subsequent Act under which plaintiffs in error might have invoked the protection of the contract impairment clause of the Federal Constitution, but for five years they stood by, consented to and acquiesced in the impairment of their rights under the contract and expressly and impliedly consented thereto, the state court, while holding that the subsequent Act did impair their contracts, also held that they were estopped and barred by their laches, consent and acquiescence in asserting such contract rights against the newly acquired and vested rights of other parties, done and acquired with their full knowledge and consent. This Court very properly held that where a party has by laches and acquiescence waived the right to insist that a state statute impaired the obligation of a contract, there is no federal question. In fact, no effect was given to the state statute. No decision was made in favor of its constitutionality, and no rights were impaired by it. The plaintiffs' rights were lost by their own consent and implied contract.

Rld. Co. v. *Rock*, 4 Wal. 177, cited by defendant in error, merely holds that the federal question cannot be raised by the state court's certificate, and that "This court cannot review the decision of a state court upon the *general* ground that that court has decided a contract void which this court may think to be valid, it must be the Constitution or some statute of the state which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution or laws of the United States; and a decision of the state court must sustain the law of the state in the matter in which this conflict is supposed to exist or the case for this court does not arise."

As appears from the foregoing, counsel for defendant in error seem to cite cases wholly without discrimination and to no good purpose. We have examined the many cases cited and

find that they have absolutely no application to the question involved on this motion to dismiss and therefore decline to unnecessarily extend this brief discussing them.

Apparently counsel for defendant in error totally overlook, at least they ignore the essential fact that distinguishes the case at bar from all the cases cited, to-wit, that the state court *has given effect* to the legislative Act of 1911 which is claimed by plaintiff in error to impair the obligation of its contracts. There is no issue joined on the question that a state court by its *decision* may or may not impair the obligation of contracts. Such decisions may deprive litigants of great contractual and property rights, but in the absence of legislation of some kind, there can be no relief. The injunction of the Constitution is that "No state shall * * * pass any * * * law impairing the obligation of contracts." There is no inhibition against the rendition of judgments impairing the obligation of contracts; but the rendition of a judicial decree is essential to the enforcement of a legislative Act. Therefore the two must concur to give this Court jurisdiction under the Federal Statutes and Constitution. The record in the case at bar shows the concurrence of these essentials.

An examination of the authorities cited in the brief for defendant in error will show that at least fifty cases are indiscriminately cited in support of uncontroverted propositions either on this motion or on the merits of the case.

We do not understand that the merits of the case are here now involved; suffice it to say that it is admitted that the contracts in question are in due and regular form and do now exist between plaintiff in error and said cities; that they are evidenced by ordinances, the most solemn and dignified legislative Act of which said municipalities are capable; that said ordinances in terms fix schedules of rates for natural gas; that plaintiff in error is entitled to charge and collect according to

said schedules, except that the Public Utilities Act of 1911 makes such charging and collecting unlawful.

Whether or not said contracts were unauthorized, *ultra vires*, necessarily arises in the case when presented on its merits, and that question must be decided by this Court independent of the state court. Defendant in error has failed to show any special or peculiar circumstances why this case should be assigned out of its regular order under Rule 26 of this Court.

Wherefore, plaintiff in error submits that the motion of defendant in error to dismiss the writ of error is not well taken and should be by this Honorable Court denied.

J. W. DANA,
Counsel for Plaintiff in Error.

Supreme Court, U. S.
FILED.
MAY 26 1913
JAMES H. McKENNEY
CLERK

No. 472

In the

Supreme Court of the United States

October Term, 1912.

THE WYANDOTTE COUNTY GAS COMPANY,
Plaintiff in Error,

vs.

STATE OF KANSAS, on Relation of JOHN MARSHALL as Attorney for the Public Utilities Commission of the State of Kansas, *Defendant in Error.*

In Error to the Supreme Court of the State of Kansas.

MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OR TO AFFIRM THE JUDGMENT OR TO ADVANCE THE CAUSE.

JOHN MARSHALL,
Topeka, Kansas,
RICHARD J. HIGGINS,
Kansas City, Kansas,
Attorneys for Defendant in Error.

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Plaintiff in Error,

vs.

STATE OF KANSAS, on Relation of JOHN MARSHALL as Attorney for the Public Utilities Commission of the State of Kansas, *Defendant in Error.*

In Error to the Supreme Court of the State of Kansas.

No. 995.

MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OR TO AFFIRM THE JUDGMENT OR TO ADVANCE THE CAUSE.

Motion.

Defendant in error, the State of Kansas, moves the Court:

First. To dismiss said cause for the reason that no federal question is involved, all such questions having been repeatedly determined by this Court adverse to the claims made by plaintiff in error, or, if said motion be denied,

Second. To affirm the judgment of the trial court, for the reason that the writ of error was procured for delay only, and the questions upon which the court depend are so frivolous as not to require further argument; or in the event that both said motions are denied,

Third. To transfer said cause to the summary docket, as provided in paragraph five, rule six.

JOHN MARSHALL,
RICHARD J. HIGGINS,
Attorneys and Solicitors for Defendant in Error.

STATEMENT OF CASE.

This is an action brought in the District Court of Wyandotte County, Kansas, by the State of Kansas, on the relation of the attorney for the Public Utilities Commission, to restrain the Wyandotte County Gas Company from increasing the price of natural gas from twenty-five to twenty-seven cents per thousand cubic feet to its consumers in the cities of Rosedale and Kansas City, Kansas, until permission so to do is first obtained from the Public Utilities Commission of the State of Kansas, which permission must be obtained in the manner provided by Chapter 238 of the Laws of 1911.

The plaintiff in error, the Wyandotte County Gas Company, in its answer asserts that it has valid contracts with the cities of Rosedale and Kansas City, Kansas, which were made prior to the passage of Chapter 238 of the Laws of 1911; under the terms of the contracts it may increase the price of its product from twenty-five to twenty-seven cents per thousand cubic feet; that the contract made with Kansas City, Kansas, it being a city of the first class, was made under the provisions of Chapter 122 of the Laws of 1903, and more particularly Section 170a of said Chapter, same being Section 1035 of the General Statutes of 1909.

The plaintiff in error in its answer further alleges as a defense to the petition of defendant in error that by reason of the matters set up in its answer, the said act relating to public utilities (Chapter 238 of the Laws of 1911) and the construction placed thereon by plaintiff (defendant in error) and the commencement of and the prosecution of this suit are each and all in conflict with and in violation of the following provisions of the Constitution of the United States, to-wit:

"(a) Sec. 10 of Art. 1: 'No state shall * * * pass any law impairing the obligation of contracts.'

(b) Art. 5, Amendments: 'No person shall * * * be deprived * * * of property without due process of law; nor shall private property be taken for public use without just compensation.'

(c) Art. 14 of Amendments: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The judgment of the District Court of Wyandotte County, Kansas, was in favor of the State of Kansas and against the Wyandotte County Gas Company, which judgment was upon appeal to the Supreme Court of Kansas affirmed. (See 88 Kansas 165.)

The judgment of the District Court of Wyandotte County, Kansas, and the affirmance of said judgment by the Supreme Court of Kansas, was upon these grounds:

First. That under the provisions of Chapter 122 of the Laws of 1903, which was the act in force at the time the City of Kansas City made its contract with the Gas Company, and more particularly Sections 170 and 170a thereof, being Sections 1034 and 1035, G. S. 1909, *the city was without power to make a binding contract fixing the rates to be charged by the plaintiff in error, and therefore the contract made is void as to rates.*

Second. That although the City of Rosedale possessed the power to make a contract fixing rates to be charged by the public utility, the contract made, by its express terms, limited the rates to be charged in the City of Rosedale to the rates in force in the City of Kansas City, Kansas.

Third. That by reason of the terms of the Public Utilities Act no increase in rates can be put into effect in this case, there being no contract which permits it, until an application is first presented to the Public Utilities Commission of the State of Kansas; that no such application was ever presented by the Wyandotte County Gas Company, and, therefore, its attempt to increase the price for its product is unlawful and an injunction should be granted.

Section 30, Chapter 238, of the Laws of Kansas of 1911, which appears to be the particular section of the act which is alleged to violate the constitutional rights of the plaintiff in error, provides:

> "Unless the commission shall otherwise order, it shall be unlawful for any common carrier or public utility governed by the provisions of this act within this state to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same service on the 1st day of January, A. D. 1911."

A very cursory examination of the opinion and judgment of the Supreme Court of Kansas, 88 Kansas 165, will show that no error can be predicated for review by this Court of the decision of that court upon the point complained of. This case was really decided, so far as any substantial rights possessed by the plaintiff in error is concerned, upon the first point, that is to say, upon the power vested in cities of the first class under the provisions of Chapter 122 of the Laws of 1903 to make a binding contract fixing rates, and no federal question is set up or claimed with reference to that point.

Therefore, the decision of this Court could in no event be to the effect that there is a binding contract between the plaintiff in error and the City of Kansas City, Kansas.

BRIEF AND AUTHORITIES ON MOTION.

I.

All presumptions are against this Court having jurisdiction.

"There are no presumptions in favor of the jurisdiction of the courts of the United States; but the facts upon which it rests must in some form appear in the record of all suits prosecuted before them. To this there are no exceptions."

Ex parte Smith, 94 U. S. 455.
Continental Ins. Co., 119 U. S., l. c. 239.

"This is because courts of the Union being courts of limited jurisdiction, the presumption in every stage of the case is that it is without their jurisdiction unless the contrary appears from the record."

Bors v. *Preston*, 111 U. S., l. c. 255.
Grace v. *Insurance Co.*, 109 U. S. 278.
Robertson v. *Cease*, 97 U. S. 646.

II.

The jurisdiction of this Court fails as to every point except the unconstitutionality of Section 30 of Chapter 238, Laws of 1911, because plaintiff in error did not specify, set up or claim any federal question in the trial court as to any other act or law. It is the record of the trial court that is here for review. Reference to this will reveal the fact that no federal right was referred to, except with reference to Section 30, Chapter 238 of the Laws of 1911.

This is the teaching of a large number of federal cases. We quote from the opinion of this Court in the celebrated case of *ex parte Spies*, 123 U. S., l. c. 183:

> "To give us jurisdiction under Section 709 of the Rev. Stat., because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way. To be reviewable here, the decision must be against the right so set up or claimed. As the Supreme Court of the state was reviewing the decision of the *trial court*, it must appear that the claim was made in *that court*, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. * * *
>
> If the right was not set up or claimed in the proper court below, the judgment of the highest court in the state in the action is conclusive, so far as the right to review here is concerned."

In *Miller* v. *State of Texas*, 153 U. S. 538, it is said:

> "And if the XIV amendment limited the power of the states as to such rights as pertaining to citizens of the United States, we think it was fatal to this claim that it was not *set up in the trial court*."

In *Morrison* v. *Watson*, 154 U. S., l. c. 115, it is said:

> "In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a state, on the ground that it decided against the title, right, privilege or immunity, claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have been specially set up or claimed at the proper time and in the proper way. If it was not claimed *in the trial court*, and therefore, by the law and practice of the state, as declared by the highest court, cannot be considered by that court; or, if it was not claimed in any form before judgment in the highest court in the state, it cannot be asserted in this court."
>
> "A federal question not specially set up or claimed in the state court cannot be considered merely because another federal question not connected with it was raised in the state court."
>
> *Keokuk, etc., Bridge Co.* v. *Illinois*, 175 U. S. 626, 20 S. Ct. 205, 44 L. Ed. 299.

To the same effect are the following cases, to which we might add numbers *ad libitum:*

Brooks v. *Missouri*, 124 U. S. 394.
Chappell v. *Bradshaw*, 128 U. S. 132-134.
Schuyler Nat'l Bank v. *Bollong*, 150 U. S. 85.
Oxley Stave Company v. *Butler Co.*, 166 U. S., l. c. 653.

In the last cited case, the following language is most apropos of the situation here:

> "Looking into the record, we do not find that any reference was made in the court of *original jurisdiction* to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any federal right, privilege or immunity

was intended to be asserted. For aught that appears, the state court proceeded in the determination of the case without any thought that it was expected to decide a federal question." (l. c. 653.)

"It should affirmatively appear from the record that a federal question necessary to the determination of the case was

(a) raised in the state court, and

(b) that the point giving jurisdiction to the Supreme Court was also decided in the state court." (11 Cyc. 937-938.)

III.

The decision of the Supreme Court in this case, upon independent grounds not involving the federal question, is broad enough to sustain the judgment, for which reason the writ of error should be dismissed or the judgment affirmed.

It will be observed in the first place that the opinion of the Kansas Supreme Court is based not upon the power of the state to set aside, alter, modify or suspend any of the provisions of the contract made between the Wyandotte County Gas Company and the City of Kansas City, Kansas. It is not claimed by the plaintiff in error and was not claimed at any time that the Public Utilities Act is unconstitutional generally. What they did claim was this:

First. That there was and is an existing, valid, binding contract between the City of Kansas City, Kansas, and the Gas Company, under the terms of which the Gas Company was authorized to collect an increased price for gas at the time this suit was commenced.

Second. That the State of Kansas by an act of the legislature passed, subsequent to the time when the contract was made, attempted to affect the contract rights of the plaintiff in error, and that such subsequent act of the legislature, to-wit, Chapter 238 of the Laws of 1911, by reason of the fact that it affected the claimed constitutional rights of the plaintiff in error was and is unconstitutional and void, in so far as the right of the plaintiff in error is concerned.

The Kansas courts held, not that the contract of the plaintiff in error was subject to a law subsequently adopted by the legislature, but that the plaintiff in error had no contract fixing rates; that none could be made under the power granted in Chapter 122 of the Laws of 1903, and the decision of the Kansas courts upon this point cannot be reviewed by this Court, for as is said by this Court in the case of *Bacon* v. *Texas*, 163 U. S. 207, 216, 41 L. Ed. 132-136:

> "Where the federal question, upon which the jurisdiction of this court is based, grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired, in the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court by some subsequent statute of the state which has been upheld, or effect given it by the state court. If the judgment of the state court gives no effect to the subsequent laws of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract."

Now, the Kansas courts decided the case adverse to the contention of the plaintiff in error upon the first proposition above stated—that is, they held that regardless of the passage of Chapter 238 of the Laws of 1911 that the Wyandotte County Gas Company had no binding contract fixing rates. That they never had any such binding contract, because the city was

never authorized by the State to enter into such a contract. There was and is no federal question involved in the decision upon this point.

IV.

If for the sake of argument it should be admitted that there is a federal question presented in this case, the writ of error should be dismissed or the judgment affirmed, because the judgment in the case may be supported by the decision of the Supreme Court of Kansas on non-federal grounds.

In *Berea College* v. *Kentucky*, 211 U. S. 45, l. c. 53, Mr. Justice Brewer said:

> "Upon this we remark that when a state court decides a case upon two grounds, one federal and the other non-federal, this court will not disturb the judgment, if the non-federal ground, fairly construed, sustains the decision."

To the same effect see:

Seneca Nation v. *Christy*, 162 U. S. 284, l. c. 289.
Pierce v. *Somerset Railway Co.*, 171 U. S., l. c. 648.
Eustis v. *Bolles*, 150 U. S. 361.
2 Foster Fed. Proc., Sec. 500, page 1187, and cases cited.
California Powder Works v. *Davis*, 151 U. S., l. c. 393.
Klinger v. *Missouri*, 13 Wall. 257.
Rutland Railroad v. *Central Vermont R. R.*, 159 U. S. at 640.
Giles v. *Teasley*, 193 U. S. 146.
Allen v. *Arguimbau*, 198 U. S. 149.

The sole point in this case turns upon the construction of Chapter 122 of the Laws of 1903, which question is one entirely for the state courts to decide.

The one real question presented in this case was: Did the City of Kansas City have the power to make a contract fixing rates for the Wyandotte County Gas Company for a period of twenty years at the time the contract was made, to-wit, in 1905? The Supreme Court of Kansas has construed Chapter 122 of the Laws of 1903 as not giving this power. The decision of the Supreme Court of Kansas is not reviewable upon this point, no matter how the point may be preserved.

The question of the proper construction of statutes is entirely for the decision of the highest court of the state, and when such construction is made it forms a rule for this Court. This has been the doctrine of this Court from the very beginning.

In the case of *Mississippi, Missouri Railroad Company* v. *Rock et al.*, 4 Wal. 177, 18 L. Ed. 382, this Court said:

> "The whole case in the language of the brief is put upon the ground that the Supreme Court of Iowa has made a decision in this case which impairs the obligation of contracts and the argument goes upon the fundamental error that this court can, as an appellate tribunal, reverse the decision of a state court, because that court may hold a contract to be void, which this court might hold to be valid. If this were the law, every case of a contract held by a state court not to be binding for any cause whatever can be brought to this court for review and we should thus become the court of final resort in all cases of contracts, where the decision of state courts held against the validity of contracts set up in those courts."

This obviously was not the purpose of the judiciary act. It must be the Constitution or some law of the state which

impairs the obligation of the contract or which is otherwise in conflict with the Constitution of the United States and the decision of the state court must sustain the law, or Constitution of the state, in the manner of which the conflict is supposed to exist, or the case for this Court does not arise.

It therefore follows that this Court must accept as final the opinion and conclusion of the Supreme Court of Kansas in construing Chapter 122 of the Laws of 1903 for two reasons:

First—That the question is not before this Court for review, for the reason that no federal question thereon was decided by or presented to the Kansas courts.

Second—For the additional reason that the Kansas courts merely construed the provisions of an Act of the legislature, which is their prerogative.

This being correct, it is indisputable that the plaintiff in error possesses no contract fixing rates between itself and the City of Kansas City, Kansas. If it possesses no contract, its claim that its contract rights are impaired must, of course, fail, and the petition in error be dismissed.

The Public Utilities Act is really not connected with this case. Its passage was not necessary to this decision, and under the original Act, i. e.. Chapter 122 of the Laws of 1903, the same decision would have been made.

By the decision in this case the Supreme Court of Kansas found:

(a) That the City of Kansas City was without power to make a binding contract fixing a schedule of rates during the entire term of the franchise; that any such attempt was *ultra vires* the City and the State.

(b) That the original rate named, to-wit, 25 cents, must stand until changed by the City or State.

Now, then, if Chapter 238 of the Laws of 1911 had never been enacted, the result of this adjudication would be the same. The rate of 25 cents would be the correct and lawful rate, and no increase could be made without the consent of the City, and the State of Kansas could maintain this suit with like results. The rate would be enforcible, not as a compulsory regulation (the Company was under no compulsion to accept the franchise); not as a contract fixing the rates for a definite time (the cities were without power to make such contract), but merely as a condition of the franchise grant.

Such a provision as that upon which the plaintiff in error relied in the Supreme Court of Kansas as giving it a binding contract, that is the power to give its consent to a public service corporation to use its streets on such terms and conditions as may be agreed upon has been uniformly held to authorize the city to impose as a condition of its consent such legal and reasonable terms as it might please.

Blair v. *Chicago*, 201 U. S. 400, 457.
St. Louis v. *Telegraph Co.*, 149 U. S. 465.

The authorities are quite agreed that such a provision confers upon a city power, in granting a franchise to a public service corporation to fix maximum rates to be charged by it, as a condition of the franchise.

Gedke v. *R. R. Co.*, 43 App. Div. (N. Y.) 514.
People v. *Barnard*, 110 N. Y. 548.
Alleghany City v. *R. R.*, 159 Pa. St. 411.
People v. *R. R.*, 178 Ill. 594.
Omaha Water Co. v. *Omaha*, 147 Fed. 1.
3 Elliott on R. R. (2d Ed.), Secs. 1081 and 1096.
Nellis on Street Surface Railroads, p. 105.
27 Encyc. of Law (2d Ed.) 21-22.

The effect of such a condition in the franchise of a public service corporation is the same as if written in the Company's charter.

People v. *R. R. Co.*, 178 Ill. 594.
Grosse Points v. *R. R.*, 130 Mich. 363.
City of Lansing v. *R. R. Co.*, 109 Mich. 121, 127.
State ex rel. v. *R. R. Co.*, 72 Wis. 612.
Sioux City R. R. v. *Sioux City*, 138 N. S. 98-108.
Selectmen of Clinton v. *R. R.*, 197 Mass. 279-285.
Cleveland v. *R. R.*, 194 U. S. 517-534.
Fath v. *R. R.*, 105 Mo. 535-548.
City of Detroit v. *R. R.*, 95 Mich. 456-461.

This is true for the reason that in imposing such conditions the city is acting as an agent of the state and exercising its sovereign power.

In *Sioux City R. R.* v. *Sioux City*, 138 U. S. 98, 108, it was said that a franchise granted by a city under authority from the state had the same effect as if directly granted by the state.

In *Cleveland* v. *R. R.*, 194 U. S. 517, 534, the court said that, in passing ordinances under such power, the city "was exercising a portion of the authority of the state, as an agency of the state."

In *State ex rel.* v. *R. R.*, 72 Wis. 612, the court said:

> "What the common council does within that power is done by the legislature through its agency."

In *City of Detroit* v. *Detroit R. R.*, 56 Fed. Rep. 867, 880, Judge Taft said that the condition, though named by the city, was imposed by the state.

To the same effect are *Blodgett* v. *Worcester R. R.*, 192 Mass. 106, and *Allegheny City* v. *R. R.*, 159 Pa. St. 411, 415.

In *City of Detroit* v. *R. R.*, 95 Mich. 456, 461, the court said:

> "While it is true that ordinances of this class have been held to partake of the nature of contracts, yet they are none the less by-laws, and have the force and effect, *in favor of the municipality, and against persons bound thereby, of laws passed by the legislature.*"

In *Citizens' Horse Railway Co.* v. *Belleville*, 47 Ill. App. 388, it was held that the consent of the city had the same effect as the grant by the state, and formed a part of it.

In *City of Lansing* v. *R. R.*, 109 Mich. 121, 127, the court said that the conditions imposed by the city "are as binding as though imposed in the statute."

In *People ex rel.* v. *R. R.*, 178 Ill. 594, the court said:

> "Such power thus delegated is exercised by the municipal authorities *acting in behalf of the state for the benefit of the public.*"

It may be said to be elementary that in conferring a franchise to use the streets, in the exercise of its delegated authority from the legislature, a city's common council act on behalf of the state as its agents, and not as agents of the municipal corporation. The duty of protecting the public streets for public travel is a public and not a corporate duty.

Schultz v. *Milwaukee*, 49 Wis. 249.
Little v. *Madison*, 49 Wis. 605.
Williams v. *Yorkville*, 59 Wis. 119.
Kittredge v. *Milwaukee*, 26 Wis. 46-50.
Griggs v. *Foote*, 4 Allen 195.
Manners v. *Haverhill*, 135 Mass. 165.
McCarty v. *Boston*, 135 Mass. 197.
People ex rel. v. *Auditors*, 75 N. Y. 316.
Transportation Co. v. *Chicago*, 99 U. S. 635.
Smith v. *Washington*, 20 How. (U. S.) 135.

The State may fix in the Company's charter the rates to be charged by it, and the rates thus fixed will be binding upon the Company (*i. e.*, the Company cannot exceed those rates), though the State may reserve the power to reduce the rates.

> *Grand Rapids, etc., R. R.* v. *Osborne*, 193 U. S. 17, 29.
> *Louisville & N. R. R.* v. *Kentucky*, 183 U. S. 503.
> *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362.
> *Ashley* v. *Ryan*, 153 U. S. 436.

In *Grand Rapids, etc., R. R.* v. *Osborne, supra*, Mr. Justice White, now Chief Justice (who wrote the court's opinion) said:

> "Having voluntarily accepted the privileges and benefits of the incorporation laws of Michigan, the company was bound by the provisions of the existing laws regulating rates and fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. *Daniels* v. *Yearney*, 102 U. S. 415, and cases cited. That a corporation may contract with a municipality or a state to operate a railroad at agreed rates is unquestionable."

In *Louisville & N. R. R. Co.* v. *Kentucky, supra*, Mr. Justice Shiras (who wrote the court's opinion) said:

> "We do not put the disability of the company to raise these questions upon the ground of an estoppel, strictly speaking, but upon the proposition that the company takes and holds its franchises and property subject to the conditions and limitations imposed by the state in its (the company's) constitution (*i. e.*, charter)."

Rates fixed by a city in a company's franchise, under the power from the state, are equally binding upon the company.

The authorities cited above are conclusive upon this point.

In *People ex rel.* v. *R. R.*, 178 Ill. 594 (one of the cases cited), it was said:

"The ordinance, the acceptance thereof and the enjoyment of the benefits of its provisions by the respondent company must be regarded as *establishing*, so far as the respondent company is concerned, and as *estopping it to deny, that the exaction of a greater sum for the transportation of passengers * * * is an unreasonable exaction and unjust discrimination.*"

VI.

Under the rules of this Court a motion to dismiss may be coupled with the motion to affirm. We think it manifest and obvious that the writ of error was taken for delay and for delay only. We therefore most respectfully request that the judgment of the trial court be in all things affirmed.

See

McKee v. *Rains*, 77 U. S. 26.
Hennessy v. *Sheldon*, 79 U. S. 440.

JOHN MARSHALL,
RICHARD J. HIGGINS,
Attorneys for Defendant in Error.

To the Wyandotte County Gas Company, Plaintiff in Error:

You are hereby notified that on the..... day of....., A. D. 1913, or as soon thereafter as the same can be heard, the defendant in error will present the above motion to dismiss, advance or affirm.

.....

.....

Attorneys for Defendant in Error.

Service of the foregoing motion, argument and notice is hereby acknowledged on this.....day of....., A. D. 1913.

.....

Office Supreme Court, U. S.
FILED
NOV 24 1913
JAMES D. MAHER
CLERK

NUMBER 472.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

THE WYANDOTTE COUNTY GAS COMPANY, PLAINTIFF IN ERROR,

VS.

THE STATE OF KANSAS, ON RELATION OF JOHN MARSHALL, ATTORNEY FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF DEFENDANT IN ERROR.

HENDERSON S. MARTIN,
A. E. HELM,
RICHARD J. HIGGINS,
Solicitors for the Defendant in Error.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT OF CASE.

This action was commenced in the district court of Wyandotte County, Kansas, January 4, 1912, by the defendant in error, The State of Kansas on the relation of John Marshall as Attorney for the Public Utilities Commission for said State, to enjoin the plaintiff in error, Wyandotte County Gas Company, from increasing the

price of its product, natural gas, to domestic consumers in the cities of Kansas City, Kansas and Rosedale, Kansas from twenty-five cents to twenty-seven cents per thousand cubic feet, until permission so to do was first obtained from the Public Utilities Commission of the State of Kansas.

The plaintiff in error, as the successor of the grantees therein, has franchises granted by Kansas City and Rosedale, Kansas, for furnishing natural gas to the respective cities. The franchise granted by Kansas City was granted December 13, 1904, and runs for a period of twenty (20) years. It contains the following provisions with respect to rates (Transcript of Record 34-40):

> SECTION 3. Said grantee, its successors and assigns shall be entitled to charge and collect from consumers of such gas, during the period of two years from and after natural gas is first furnished hereunder *at the rate of not to exceed twenty-five (25) cents per thousand cubic feet, and during the period of one year next thereafter, at the rate of not to exceed twenty-eight (28) cents per thousand cubic feet*, and during the period of one year next thereafter at the rate of not to exceed twenty-nine (29) cents per thousand cubic feet, and during the period of one year next thereafter at the rate of not to exceed thirty (30) cents per thousand cubic feet, and thereafter, during the period of the aforesaid grant, at the rate of not to exceed thirty-five (35) cents per thousand cubic feet.
>
> SECTION 8, PARAGRAPH 14. If any Ordinance of the city of Kansas City, Missouri, au-

thorizing the use of the pipes of the Kansas City Missouri Gas Company for the distribution of natural gas under which said pipes of said company shall be applied to the distribution of natural gas in Kansas City, Missouri, shall fix lower rates for natural gas for lighting, heating, power, or manufacturing purposes than those fixed by this ordinance, the grantee shall file in the office of the City Clerk of Kansas City, Kansas, a certified copy of such ordinance of the City of Kansas City, Missouri, (and if the grantee shall fail or refuse to so file such certified copy within thirty days after natural gas is sold in Kansas City, Missouri, thereunder, any citizen of Kansas City, Kansas, may so file the same) and from and after such filing the grantee shall charge no greater rates for said natural gas, or no greater minimum monthly bill, as the case may be, than those fixed in such ordinance of the City of Kansas City, Missouri, so long as such rates shall there be in force under such ordinance, and natural gas there sold according to the same.

Natural gas was first furnished in Kansas City, Kansas under such ordinance in August, 1905 (Transcript of Record 30).

The City of Kansas City, Missouri, thereafter granted a franchise authorizing the use of the pipes and mains of the Kansas City, Missouri, Gas Company for the distribution of natural gas, a copy of which franchise was by the plaintiff in error, in accordance with the provisions of Section 8, paragraph 14, *supra*, filed in the office of the City Clerk of Kansas City, Kansas

(Transcript of Record, 30-31). In said franchise the following provision was made respecting rates:

> SECTION 13. The said grantees shall be entitled to charge and collect from consumers of such gas, during the period of five years from and after natural gas is first furnished hereunder *at the rate of not to exceed twenty-five (25) cents per thousand cubic feet, and during the period of five years next thereafter at the rate of not to exceed twenty-seven (27) cents per thousand cubic feet, and thereafter during the period of the aforesaid grant,* (being thirty years) at the rate of not exceeding thirty (30) cents per thousand cubic feet. (Transcript of Record 31).

Natural gas was first furnished under the franchise granted by Kansas City, Missouri, in November, 1906, and still continues to be furnished in accordance with the terms of said franchise (Transcript of Record, 31).

The franchise granted by the city of Rosedale, Kansas, being Ordinance No. 295 of said City, passed March 21, 1905, contains the following provision with respect to rates (Transcript of Record 31):

> Section 2. Under the authority hereby granted, the grantees shall furnish gas to said city and its inhabitants at a rate which for natural gas shall not for the first five years next ensuing after the acceptance of this ordinance by the grantees exceed thirty-five (35) cents for each one thousand (1000) cubic feet, and for the remaining years, that the said grantees shall furnish natural gas at a rate not to exceed forty (40) cents for each one thousand

(1000) cubic feet; provided, however, that the said grantees may charge a minimum rate of fifty (50) cents per month for service, said minimum rate to be deducted from the monthly gas bills when the same are in excess of fifty (50) cents and shall be the only charge when the monthly gas bill is for a less amount than fifty (50) cents; and, provided further, that the said grantees, their successors and assigns, shall not at any time during the life of this franchise, charge or collect from the citizens or inhabitants of said city, any greater charge or price for either natural or manufactured gas, than is charged or collected therefor, for like service, during the same period, in Kansas City, Kansas.

The plaintiff in error admits it was attempting, in January, 1912, to raise the rate to twenty-seven (27) cents in Kansas City and in Rosedale; in fact, under an order granted by the Supreme Court of Kansas, it is now collecting twenty-seven (27) cents; a bond having been executed to secure repayment of the excess portion of the rate, in the event that the judgment of the District Court of Wyandotte County is affirmed. It claims the right to make such increase by reason of the portions of the contracts heretofore set out.

Statutes Governing Public Utilities Commission.

The Public Utilities Commission of the State of Kansas was created by an Act of the Legislature of the State of Kansas, Chapter 238 of the Laws of 1911. Section one of said Act is as follows:

> Section 1. The Board of Railroad Commissioners of the State of Kansas is hereby constituted and created a Public Utilities Commission for the State of Kansas, and such commission is given full power, authority, and jurisdiction to supervise and control the public utilities and all common carriers, as hereinafter defined, doing business in the State of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.

By Section 3 of said Act a public utility—insofar as this case is concerned—is defined to include "every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or may hereafter own, control, operate or manage, except for private use, any equipment, plant, generating machinery, or any part thereof, for the transmission of telephone messages, or for the transmission of telegraph messages in or through any part of the state, or the conveyance of oil and gas through pipe lines in or through any part of the state."

In the latter part of Section 3, the following language is found:

> Nothing in this act shall apply to any public utility in this state owned and operated by any municipality. The power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally within any city or principally operated for the benefit of such city, or its people, shall be vested exclusively in such city, subject only to the right to apply for relief to said Public Utilities Commission as hereinafter provided in Section 33 of this Act.

Section 33 of said Act is as follows:

Section 33. Every municipal council or commission shall have the power and authority, subject to any law in force at the time, to contract with any public utility or common carrier situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, by ordinance or resolution, duly considered and regularly adopted: (1) As to the quality and character of each kind of product or service to be furnished or rendered by any public utility or common carrier, and the maximum rates and charges to be paid therefor to the public utility or common carrier furnishing such product or service within said municipality, and the terms and conditions, not inconsistent with this act or any law in force at the time under which such public utility or common carrier may be permitted to occupy the streets, highways or other public property within such municipality. (2) To require and permit any public utility or common carrier to make such additions or extensions to its physical plant as may be reasonable and necessary for the benefit of the public, and may designate the location and nature of such additions and extensions at the time within which such shall be completed, and the terms and conditions under which the same shall be construed. (3) To provide a reasonable and lawful penalty for the noncompliance with the provisions of any ordinance or resolution adopted in pursuance with the provisions hereof; provided, however, that no ordinance or resolution granting or extending any right, privilege or franchise shall be in force or effect until thirty days after the same shall have been duly published;

nor if any complaint be made, as hereinafter provided for, shall said ordinance or resolution be in effect while any proceedings to review before said commission or action or appeal in any court in relation thereto shall be pending. Upon any complaint being made, within fifteen days after the publication of any such ordinance or resolution, to the Public Utilities Commission by any such public utility or common carrier, or by ten or more tax payers of any such municipality a bond to pay the cost of the hearing having first been filed by the complainant with and approved by the said commission, that any right, privilege or franchise granted, or ordinance or resolution or part of any ordinance or resolution adopted, by any municipal council or commission, is unreasonable, or against public policy, or detrimental to the best interests of the city, or contrary to any provisions of law, the Public Utilities Commission shall set a date for the hearing of such complaint, not less than ten days after date of filing thereof, and shall cite the parties interested to appear on a date named, which date shall be not less than ten days after the fixing of the date of the hearing, and on that date, or at a time agreed upon by the interested parties, or a date fixed by the Public Utility Commission, the complainant shall present such evidence as they or it may have in support thereof, and show why such complaint should be sustained, and the Public Utility Commission may inquire into the allegations in such complaint, and may subpoena witnesses, and take testimony to ascertain the truth of the allegations contained therein in contemplation of bringing an action as hereinafter provided, and if said commission shall find

that any provision of any such ordinance or resolution is unreasonable, or against the public welfare or public interest, or has reason to believe that the same may be contrary to law, said Public Utilities Commission shall, within ten days, advise and recommend such changes in the ordinance or resolution as may be necessary to meet the objections set forth in the complaint and protect the public interest, and to remove any unreasonable provision therefrom; and if such municipal council or commission shall not within twenty days thereafter amend such ordinance or resolution to conform to the recommendations of said Public Utilities Commission, the Public Utilities Commission may, in the name of the State of Kansas, within thirty days after such finding, commence proceedings against such municipal council or commission and common carrier or public utility governed by the provisions of this act in any court of competent jurisdiction, to set aside any ordinance or resolution, or part thereof, because of its unreasonableness or illegality, or because the same is not for the promotion of the welfare and best interests of said municipality, which action and proceedings shall be in conformity with the provisions of this act.

Section 30 of said Act is as follows:

Unless the commission shall otherwise order, it shall be unlawful for any—public utility governed by the provisions of this Act within this state, to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates, for the same service, on the first day of January, 1911.

Statutes Regulating Cities First Class in Force in 1904.

At the Session of the Kansas Legislature held in 1903, there was enacted Chapter 122 of the Laws of 1903, which took effect on March 18, 1903. This act was evidently intended as a codification of all laws relating to cities of the first class. By the terms of Section 201 of the act it in terms repeals Chapter 37 of the Laws of 1881 (which was the last prior general act relating to cities of the first class), and all acts amendatory and supplemental thereto.

In the various compilations of the general statutes since 1903 all laws relating to cities of the first class enacted prior to 1903 have been omitted.

Chapter 122 of the Laws of Kansas, 1903, was divided by the Legislature into certain articles. By the provisions of the first section of Article 4, Section 21 of the Act (Section 883, G. S. 1909) it is provided:

> The mayor and council shall have the care management and control of the city and its property and finances; and shall have power to enact ordinances for all the purposes named and provided for in this article not repugnant to the constitution and laws of this state, and to alter, amend, modify and repeal such ordinances.

Said article four continues in Section 51 of such act, the same being Section 913 of the General Statutes of 1909:

> To prescribe and fix maximum rates and charges and regulate the collection of the same, for

all water, electric light, heat, power, gas, telephone service, or any other commodity or service furnished to such city, or to any of the inhabitants thereof, by any person or corporation now authorized by such city by virtue of a franchise ordinance, or that may hereafter be authorized by virtue of a franchise ordinance to furnish water, electric light, power, gas or telephone service, or any other commodity or service, to such city or its inhabitants. The rates and charges so prescribed shall at all times be reasonable and just; and if any city shall fix unreasonable and unjust rates and charges, the same may, at the instance of any producer or consumer, be reviewed and determined by the District Court of the county in which such city is situated.

The other acts defining the powers of cities of the first class, among which is and was Kansas City, which were in force at the time the City of Kansas City granted the franchise to the predecessor of the Wyandotte County Gas Company, plaintiff in error, are as follows:

Section 169, Chapter 122 Laws of 1903 same being Section 1033, General Statutes of Kansas, 1909, which reads as follows:

"The municipal authorities of any city governed and controlled by the provisions of this act may permit any person, company or corporation to manufacture, sell and furnish gas light, electric light, power or heat to any city in this state, and street railways to be operated along and over the streets of and public grounds of the city, and may extend and renew any existing contracts with any such person, company or corporation for the construction and operation of a street railway over

and along the streets, and for the supplying of gas lights, electric light, power or heat to any city in this state, upon the conditions hereinafter imposed in this act which shall be specifically provided for in the ordinances and contracts granting or giving any such original grant, franchise, or privilege, or extending or renewing any existing grant, right privilege, or franchise. Provided, That any contract, grant or franchise now existing or which may hereafter be granted to any such person, company or corporation shall not extend for any longer period of time than thirty years from the date of such grant or extension."

Section 170, Chapter 122 Laws of 1903, same being Section 1034, General Statutes of Kansas, 1909, which reads as follows:

"As a consideration for a franchise to lay pipes through the streets of the city for gas or heat, or to string electric wires for light or power, to supply the inhabitants with light, heat, or power, or to construct, maintain and operate a street railway along and over the public streets and grounds of such city, the said city may require in the ordinance granting such franchise or privilege or renewal or extension of any existing contract or franchise with any person, company or corporation a report once in six months. Said person, company or corporation shall pay into the city treasury ten per cent of its net earnings over and above ten per cent earnings on its investment by such person, company, or corporation; all contracts, grants, and franchises now existing to or with any such person, company, or corporation, with the consent of the mayor and

council may be extended and continued in force for a period not exceeding thirty years from date of such grant of extension. The mayor and council of any such city shall at all times during the existence of any such grant, contract or privilege have the right by ordinance to fix a reasonable schedule of maximum rates to be charged for public and private purposes, including street lighting by any such person, company, or corporation, to the inhabitants of any such city, for gas light, electric light, electric power, or heat, and the rates of fare on any street railway. Provided, however, that said mayor and council shall at no time fix a rate which will prohibit such person, company, or corporation from earning at least ten per cent on its capital invested in such city over and above its reasonable operating expenses and the expenses for maintenance and taxes."

Section 170-A, Chapter 122 Laws of 1903, same being Section 1035, General Statutes of Kansas, 1909, which reads as follows:

"No renewal of original grant, lease or contract provided for in this act shall continue for a longer period than thirty years, and the city may acquire title to any gas light, electric light, electric power, street railway or heating plant of any private corporation upon the termination of any future grant, lease or contract made in accordance with this act, and all the rights, privileges and property thereto pertaining in the following manner, to-wit: The city may, upon the termination of any future grant, lease or contract with any such cor-

poration, file a petition in the District Court of the county in which such city is situated, against the owner or owners of any such plant and others interested, therein, which petition shall contain a general description of the plant or property, setting forth the interest or property rights of said corporation or others therein, as near as may be done, and praying that the city may be permitted to acquire a title thereto in the manner provided in this act. Thirty days' notice shall be given to all persons interested in said property at the time for the hearing of said application, by publication in three successive issues of some weekly newspaper printed in such city having general circulation therein, the first of which shall not be less than thirty days prior to the time of the hearing, and also by delivering a copy of such notice to the manager of such plant, if such manager can be found within the county. In such proceedings, petition and notices it shall not be necessary to state the names of any of the parties interested as defendants, except those of the reputed owner or owners. At the time set for the hearing of such petition the court shall appoint three disinterested commissioners, nonresidents of the city, one of whom shall be named by the court, who shall be an expert engineer in such line, one by the city, and one by the company, person or corporation owning such plant. The commissioners so appointed, after having taken and subscribed an oath to faithfully and impartially discharge their duties as such commissioners, shall forthwith proceed to determine the then present value of any such plant, which value shall be a fair value thereof. The commissioners so appointed

shall have power to administer oaths, to subpoena and compel the attendance of witnesses and the production of books and papers, and any citizen, taxpayer or officer of the city may appear before them and be heard as to the city's interest. Within thirty days after their appointment, unless for good cause shown the time be extended by the court or the judge thereof, the commissioners shall file their reports with the clerk of said District Court. If any commissioner so appointed shall fail to act, or his place become vacant for any other reason, the vacancy shall be filled in the manner of his original appointment. Within ten days after the filing of such report, any citizen of such city or other person interested may file exceptions thereto; and thereupon the court or the judge thereof shall appoint a time, not more than thirty days from the filing of such report, for the hearing of said exceptions, which exceptions shall be heard in a summary manner, without pleading, and upon such hearing the court may confirm the said report, or may set the same aside, as shall be just, and appoint new commissioners. In the event that such report shall be set aside, further proceedings shall be had in all respects as in the case of the original appointment of commissioners, until the award of the commissioners shall be confirmed by the court. Said commissioners shall be allowed three dollars per day for services rendered, to be paid out of the city treasury. At any time within four months after the confirmation of such award by the District Court, the city may deposit the amount of the award with the treasurer of the county, for the use of the owner or owners or others interested in

such plant; and if for any cause such commissioners so appointed shall fail or refuse to make and file their reports within the time limited therefor, the court, by attachment, may compel such filing, or may discharge such commissioners and cause new ones to be appointed as hereinbefore prescribed. From the time of making such deposit with the county treasurer, the city shall be absolute owner of any and all privileges, property and property rights of any such corporation and all others in any way interested in any such plant, free and clear of the claims of all persons theretofore interested therein. Upon application of the city, writs of assistance shall be granted by said District Court, directing the sheriff of the county to put such city into possession of such plant. The court shall determine as to the proper disposition of the sum so awarded, including the rights of incumbrancers, owners, and all others interested therein, and any such person aggrieved by such determination may review the same by petition in error in the Supreme or Appellate Courts. Nothing in this act shall be construed as prohibiting any city governed and controlled by the provisions of this act from granting, and the mayor and council of any such city are hereby authorized to grant, to any person, company, or corporation, a franchise to construct, maintain and operate a natural-gas plant for the purposes of furnishing to said city and its inhabitants natural gas for lights, fuel, and all other purposes, with authority to lay and maintain all necessary mains and pipes in the streets, avenues, alleys and public grounds of said city, on such terms and conditions as may be agreed to by said

mayor and council and such person, company, or corporation: Provided, The such franchise shall not continue for a longer period than twenty years."

Judgment and Order on Appeal.

A permanent injunction forbidding the Wyandotte County Gas Company from increasing the price of natural gas to domestic consumers from twenty-five to twenty-seven cents was granted in the District Court of Wyandotte County, Kansas. On appeal to the Supreme Court of Kansas the judgment of the District Court was modified in this, that the increase in price should only be made with the consent of the Public Utilities Commission and as so modified affirmed.

Theory of Judgment.

The judgment and its affirmance was on the theory that the City of Kansas City did not, at the time the franchise was granted, possess the power to fix a binding schedule of rates to continue during the term of the franchise. That the plaintiff in error, in operating natural gas plants in Kansas City and Rosedale, was and is under the supervision and control of the Public Utilities Commission of the State of Kansas. That the rate, to-wit, twenty-five cents, in force January 1, 1911, it having been legalized by statute, can be changed only in the manner provided by statute. That the attempt of the plaintiff in error to increase its rates to twenty-seven cents per thousand feet, is unlawful and void.

BRIEF OF ARGUMENT.

Broadly speaking, the position of the defendant in error, is:

I.

That under the authority delegated by the legislature of Kansas to the City of Kansas City, Kansas, said city had no power to fix a binding schedule of rates to prevail during the life of the franchise. That portion of the franchise granted by Kansas City fixing rates, if interpreted as a binding contract is *ultra vires* and void That the franchise made is not a contract, but fixes maximum rates.

II.

That the City of Rosedale, while empowered to grant a franchise fixing rates, made provision in its franchise that no rate should be charged or collected in excess of the rate charged or collected in Kansas City. Therefore, the lawful rate in Kansas City being twenty-five cents, no rate in excess of twenty-five cents can be collected in Rosedale.

III.

That under the terms of the public utility act, Chapter 238 Laws of 1911, the Wyandotte County Gas Company, operating gas plants in Kansas City and Rosedale, Kansas, was subject to the provisions of such act and the control of the Public Utilities Commission.

IV.

That under the terms of the said Public Utilities Act, the rates in force and charged on January 1, 1911, by Public Utilities subject to the act, were established as the lawful rates, and no change therein can be effected without the consent of the Commission. That the rates in effect in Kansas City and Rosedale, Kansas, on January 1, 1911, were twenty-five cents per thousand cubic feet. That permission from the Public Utilities Commission to increase the rate, was not obtained, and the attempt to increase such rates was unlawful and should be enjoined.

BRIEF AND AUTHORITIES.

The first point in this case, is: Did the City of Kansas City have the power in 1904 to make a binding contract, fixing the rate to be charged by the Wyandotte County Gas Company? If it possessed such power it did not exercise it.

We think the city did not possess such power, and will consider this point first.

The powers possessed by the city must be found in the statutes heretofore set out. These several statutes are parts of one and the same act, Chapter 122 of the Laws of Kansas 1903, being sections 21, 51, 169, 170, and 170-A, respectively. Being parts of one and the same act, they must be construed together, and force and effect given to all. There is only one construction to be given to Section 51 (913 G. S. Kans. 1909), and that is that the legislature reserved to the city power to fix by ordinance maximum rates and charges for all public utilities and to regulate the collection of the same *at any time*, and to amend, alter, modify, and repeal such ordinances. The last part of the section requires that rates shall at all times be reasonable and just. If the city shall fix unreasonable and unjust rates they may be reviewed by the District Court of the county. If this portion of the act is to be given any force or effect whatever, it necessarily implies that the right therein

conferred shall be exercised after the franchise is granted, because no court could compel a city to grant a franchise, nor can any court compel any person or corporation to accept the obligations of public service.

Section 170 of Chapter 122 Laws of Kansas 1903 (1034 Gen. Stat. 1909), expressly reserves to the mayor and council the right by ordinance to fix a reasonable schedule of maximum rates to be charged for public and private purposes, including gas, light, and heat, with the prohibition that the city cannot reduce such rates so that the utility cannot earn at least ten per cent per annum on the capital invested, over and above operating expenses, maintenance, and taxes.

Section 170-A of Chapter 122 Laws of Kansas 1903 (1035 Gen. Stat. 1909), provides the procedure by which a city may acquire and take over certain utility plants after the expiration of the franchise. In the concluding sentence in this section is found the language upon which the plaintiff in error relies as establishing the power of the city to make a contract fixing a schedule of rates to be charged during the life of the contract. This sentence does not mention rates. If the powers there granted includes the power to fix rates, it is an implied power. If the legislature had intended to give to cities the power to grant away their right to fix natural gas rates, it could have done so in explicit terms. It did not do so. The section stands with Sections 21, 51, 169 and 170, and the powers granted in 170-A, are subordinate to the powers which are retained by the mayor and council

in Sections 21, 51, 169, and 170, so far as rates are concerned.

Power to grant a franchise fixing and controlling rates must be expressly given or it is not possessed.

The plaintiff in error contends that the language used in 170-A, gave to the mayor and council of the City of Kansas City, the right, regardless of all limitations contained in the preceding sections, to fix absolutely and irrevocably a schedule of rates to continue during the term of the franchise. A more rational explanation of the meaning of this sentence seems to us to be that, natural gas was newly discovered in Kansas, manifestly it would, if the development was great enough (and it was, and did), supplant the use of manufactured gas in all cities in Kansas. The public service corporations owning manufactured gas plants, were willing to use natural gas, but knowing that natural gas might fail in a few years, were unwilling that the provisions of Section 170-A, which had to do with the city taking over the property of a public service plant on the expiration of its franchise, should apply to the plants which would be temporarily used for natural gas, so the proviso was added to this section permitting a franchise to be made for furnishing natural gas with authority to construct pipes, mains, etc., on such terms and conditions as may be agreed to, meaning thereby to authorize the use of the pipes and mains of the manufactured gas plants, without enforcing the provisions contained in the first portion of Section 170-A.

The question presented in this case has been before this court on numerous occasions. The decisions of this court hold that the power to control rates is retained by the city or state, unless the statute specifically authorizes the city to grant a franchise in which rates are fixed for the life of the franchise, or for a certain definite period. The principle seems to us well stated in 2 Wyman on Public Service Corporation, 1424, as follows:

> A contract limiting the power over rates may be made between a city and a public service company. Before holding that such a contract exists, a court must first determine whether the city has power to make such a contract. Such power may be conferred upon a city. And thus, a city ordinance, accepted by a public service company, which defines the duties of the company, and names a maximum rate of compensation, constitutes a contract, and the rate named in such an ordinance cannot thereafter be diminished. There is, however, a constant tendency to find that the ordinance did not constitute a contract and the power over rates continues.

Decisions of Supreme Court of Kansas, Establishing Rule of Construction.

This identical question was decided by the State of Kansas, *prior to the granting of the franchise by Kansas City, Kansas.* In the case of *in re* Pryor, 55 Kansas, 724, 41 Pac. 958, decided October 5, 1895 (the claimed contract with Kansas City was made Dec. 14, 1904), the City of Iola, by ordinance, attempted to fix the rates to

be charged for the use of natural gas. The Supreme Court of Kansas, in an opinion by Chief Justice Martin, held:

> The only question arising upon the record is whether the City of Iola had authority to fix the rates to be charged for natural gas furnished to private consumers by Pryor and Paullin under the circumstances above stated. In this country, municipal corporations (except the City of Washington) are the creatures of the states in which they are located. They derive their powers from the Constitution and the statutes. In *Anderson* v. *City of Wellington*, 40 Kansas, 176, 19 Pac. 719, this court said: "The power to pass a city ordinance must be vested in the governing body of the city by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation; not simply convenient, but indispensable. Any fair and reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." See also, 1 Dill. Mun. Corp. (4th Ed.) 89. The act providing for the organization and government of cities of the third class contains no express grant or power to fix or regulate the price of gas, water or any other article of necessity or luxury. General authority is given to enact ordinances for the good government and welfare of the city (Gen. St. 1889, pars. 958, 991), and such cities may provide for and regulate the lighting of the streets, and they have power to make contracts with any person, company, or association

to erect gas works, with the privilege of furnishing gas to light the streets, lanes, and alleys of the city for any length of time not exceeding 21 years (Id. par. 984). The respondent relies principally upon a section of the corporation law of 1868 relating to gas and water corporations, and published as paragraph 1401, Gen. St. 1889, which reads as follows: "*Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of gas or water as may be required by the city*, town or village *where located, for public or private buildings or for other purposes; and such corporation shall have power to lay pipes, mains and conductors for conducting gas* or water *through the streets, lanes, alleys and squares in such city, town or village, with the consent of the municipal authorities thereof and under such regulations as they may prescribe.*" Certainly there is no express power conferred upon the municipal authorities by this section to regulate the price of gas or water. Whether they might, as a condition of their consent, provide that gas or water should be furnished to the city or to its inhabitants at not exceeding certain prescribed rates, we need not now inquire. Consent was granted by Ordinance No. 268 to the Iola Gas & Coal Company, its successors and assigns, without annexing any condition as to rates, except that no more than one dollar per 1,000 cubic feet of gas should be charged for lighting the public buildings. In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this a sovereign power, which may not be delegated to cities or subordinate

subdivisions of the state, except in express terms, or by necessary implication. No such power is expressly conferred upon cities of the third class, and we do not think the right can be implied from any express provision, unless possibly that in the grant of consent to any person or corporation to so use the streets and public grounds of the city a condition might be imposed as to the maximum rates to be charged. In *Lexisville Natural Gas Co.* v. *State*, 135 Ind. 49, 34 N. E. 702, it was held that municipal corporations of Indiana have no power at common law to fix by ordinance the price at which natural gas shall be supplied to consumers, and that the act of March 7, 1887, providing "that the boards of trustees of towns and the common council of cities * * * shall have power to provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities," does not confer the power to regulate the price at which natural gas shall be furnished; overruling the case of *City of Rushville* v. *Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853. In the opinion the court says: "To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be supplied is another and a different thing." In *City of St. Louis* v. *Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, it was held that neither under its authority to regulate the use of streets, nor the power to license, tax, and regulate various professions and businesses, nor the general welfare clause permitting the passage of all such ordinances not inconsistent with the provisions

of the charter or the laws of the state as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce and manufactures, can the City of St. Louis regulate by ordinance the tariff of charges of a telephone company. In the opinion the court says: "We are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incident to the power to regulate the use of streets, and the ordinance cannot be upheld on any such grounds. *Under the section of our statute hereinbefore fully quoted a gas or water company may lay its pipes and mains through the streets of a city only with the consent of the municipal authorities; and under such regulations as they may prescribe; but the regulations are only as to the laying of pipes and mains, and have nothing to do with the price of the gas or water passing through the pipes, and supplied to consumers.* Counsel for the respondent cite the leading case of *Munn* v. *Illinois*, 94 U. S. 113, and others of like character, to the effect that, where the owner of property devotes it to a use in which the public have an interest, he must, to the extent of the interest thus acquired by the public, submit to the control of such property by the public for the common good. But in these cases the control was exercised by the legislature either directly or through municipalities or agencies clothed by it with the power. In the present case the legislative authority is wanting. We must therefore hold that said Ordinance No. 368 is inoperative and void as to said Pryor & Paullin, their heirs and assigns, insofar as the same

purports to establish the price for gas furnished by them to private consumers. The petitioner will be discharged from custody. All the justices concurring.

In the case of *City of Leavenworth* v. *Norton*, 1 Kans. 405, Dass. ed., the Supreme Court of Kansas held:

> All powers not expressly granted by the charter of a municipal corporation, or necessary to carry out these powers, held to be denied. It can take nothing by implication (*Leavenworth* v. *Rankin*, 2 Kans. 357. *Burns* v. *Atchison*, id. 455).
>
> The City of Leavenworth is a municipal corporation created by act of the legislature, and its powers are strictly limited and controlled by the provisions of the charter.

To like effect is the principle in the following cases:

Wyandotte v. *Corrigan*, 35 Kans. 24.
City of Leavenworth v. *Rankin*, 2 Kans. 357.
City of Leavenworth v. *Laing*, 6 Kans. 287.

These cases are of more than ordinary interest, because rendered prior to the making of the grant in this case, the principle of interpretation contained therein becomes as binding as a statute, or to use the apt language of plaintiff in error in his petition for rehearing, filed in the Supreme Court of Kansas, "The contracting parties are entitled to have their contract construed and their rights measured agreeable to the statute in force and the principles established by the decisions of this state at the time of entering upon said contract" (Transcript of Record, 62).

As is said in the case of *Freeport Water Co.* v. *Freeport*, 180 U. S. 593, 45 L. Ed. 686, this court will even hold that no irrepealable contract can be made if that is the declared policy of the state.

Decisions Supreme Court of United States Establishing Principles of Construction.

One of the clearest cases on this question is *Freeport Water Company* v. *City of Freeport*, found in 180 U. S. pp. 587 to 618, 45 L. Ed. 679, all of which is important in this case, parts of which decision are as follows:

> "The power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them."
>
> "A contract giving a water company the right to charge certain rates for thirty years without interference by new ordinances changing rates is not authorized by Illinois Act, April 9, 1872, empowering cities and villages to contract with such companies for a supply of water for public use for a period not exceeding thirty years, and Illinois Act April 10, 1872, empowering such municipalities to authorize persons or private corporations to construct and maintain waterworks 'at such rates as may be fixed by ordinance and for a period not exceeding thirty years,' since, under the rule requiring strict construction of such grants, the clause 'for a period not exceeding thirty years' qualifies

the words 'construct and maintain' but does not qualify the words 'at such rates as may be fixed by ordinance.'"

The statutes under which the franchise in question in this case was granted, as found on pages 681 and 682 of 45 L. Ed., are as follows:

"AN ACT to enable cities and villages to contract for a supply of water for public use, and to levy and collect the tax to pay for water so supplied. Approved April 9, 1872, in force July 1, 1872.

"SECTION 1. *Be it enacted by the people of the State of Illinois, represented in General Assembly*, that in all cities and villages where waterworks may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years" (Public Laws of Illinois of 1871, C. 271).

"AN ACT to provide for the incorporation of cities and villages, approved April 10, 1872, in force July 1, 1872.

"SECTION 1. The city council or board of trustees shall have power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs, or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance,

and for a period not exceeding thirty years; also to prevent the unnecessary waste of water, and injuries to such wells, pumps, cisterns, reservoirs, or waterworks" (Public Laws of Illinois, of 1871, p. 250; 1 Starr & Co. Stat. p. 785, Sec. 175).

"AN ACT to enable cities, towns and villages incorporated under any general or special law of this state to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof. Approved June 6, 1891, in force July 1, 1891.

"SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That the corporate authorities of any city, town, or village now or hereafter, incorporated under any general or special law of this state, in which any individual, company, or corporation has been or hereafter may be authorized by such city, town or village to supply water to such city, town, or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company, or corporation to such city, town or village and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the Circuit Court of the county in which such city, town or village may be" (Public Laws of Illinois of 1891, p. 85; 1 Starr & Co. Stat. p. 868, Sec. 458).

Mr. Justice McKenna delivered the opinion of the court, in which he says:

> "But assuming that Section 9 of the general incorporation act is correctly interpreted by the plaintiff, we are brought to the question of the power of the city to make an irrevocable contract for thirty years, fixing water rates. The power is claimed under the statutes of 1872, heretofore quoted. The Supreme Court of the state, as we have seen, decided against the claim, and the principle of *Burgess* v. *Seligman* applies if the ruling of the court and the contention of the plaintiff is 'balanced with doubt.' There were no previous interpretations of the statutes by the state courts upon which the plaintiff had a right to rely. It acted upon the faith of the statute alone, and committed its rights to a judicial interpretation of the statute. The rule which governs interpretation in such cases has often been declared. We expressed it, following many prior decisions, in *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.*, 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them. In *Smith* v. *McDowell, ex rel. Hall*, 148 Ill. 51, 23 L. R. A. 393, 35 N. E. 141, the Supreme Court of the State expressed the rule as follows: 'Their power (the power of municipal corporations) is measured by the legislative grant, and they can exercise such powers only as are expressly granted, or are necessarily implied from the powers expressly conferred.'

"The Supreme Court of the state applied these principles. It held that an irrevocable contract for specific rates was not indispensable to the other powers which the cities of the state were invested. And a distinction was made between a contract which related to a governmental function, which the regulation of rates was said to be and a contract which related to franchises which, though public in their nature, yet were not governmental, which the supply of water was said to be. This distinction, it was held, the Statutes of 1872 observed, and gave the power to make one kind of a contract, but not the other—the power to contract for a supply of water, but not the power to contract 'to pay a fixed and unalterable rate for thirty years.' This was deduced from the silence of the statute of the 9th of April, and the necessity of resolving all ambiguities in favor of the public. But ambiguity disappears, it was said, when the statute of the 9th was considered with the statute of the 10th, as it necessarily had to be, as the statutes were '*in pari materia, and should be construed together.* Section 1 of the act of the 10th of April 'authorizes,' the court said, 'the city council to empower a private corporation to construct and maintain water works at such rates as may be fixed by ordinance. The meaning of the language is not that the water works are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause, 'for a period not exceeding thirty years,' qualifies the words 'construct and maintain the same,' but does not qualify the words 'at such rates as may be fixed by ordinance.'

"The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public the court applied the rule declared in many cases. We said in the Railroad Commission Cases, 116 U. S. 307, *sub nom. Stone* v. *Farmers Loan & T. Co.*, 29 L. Ed. 636, 6 Sup. Ct. Rep. 334, 338, 1911, by Chief Justice Waite, of the power of the regulation of rates: 'This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in *Providence Bank* v. *Billings*, 4 Pet. 514, 561, 7 L. Ed. 939, 955, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports where it had been considered and applied are numerous.

"These remarks are obviously applicable to the Illinois Statutes. The question is whether the power given to the municipalities of the state was to be continuing or occasional, indeed only special in its purpose, intended to have but one exercise, and then bound in contract for thirty years. If the latter had been the intention it would have been natural to express it. The fullness of sovereignty can be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company or corporation to supply water, 'be and are hereby empowered to prescribe by ordinance maximum rates and charges for the sup-

ply of water furnished by such individual, company or corporation.' * * * 'There is no explicit provision for repetitions of the power—none declaring the power conferred a continuing one. Who now doubts that it is? If rights are claimed and were pleading for a different interpretation, we might have listened to them, but now, undisturbed by them, we yield without resistance to that meaning which the subject-matter demands in the absence of negative words.

"Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain water works 'at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.' The words 'fixed by ordinance,' may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time."

Another case which is equally interesting is the case of *Rogers Park Water Company* v. *John F. Fergus*, 180 U. S. 624, 45 L. Ed. 702. The head notes to this case are as follows:

"A contract concerning governmental functions, such as one which affects the right of a city to regu-

late rates of a water company, must be strictly construed; and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions.

"An ordinance granting an exclusive franchise to a water company, with the right to use streets, requiring the municipality to pay certain rentals, and binding the grantee, among other things, to furnish an adequate supply of water, does not give a contract the right to charge the rates named in the ordinance for the whole period of the franchise by virtue of a provision that the grantee 'shall charge the following annual rate to consumers of water during the existence of this franchise,' as this is merely a regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise."

This opinion was delivered by Mr. Justice McKenna, and is as follows:

"At the time of the passage of the ordinance of November, 1888, by the village of Rogers Park, counsel for plaintiff in error says 'two general acts were in force in Illinois, which related to the power of municipalities to pass ordinances for water works to be built and operated by private enterprise. The first is as follows: 'An Act entitled "An act to enable cities, incorporated towns and villages to contract for a supply of water for public use, and to levy and collect a tax to pay for the water so supplied." ' (Approved April 9, 1872). In force July 1, 1872. L. 1871-2, p. 271. This title is amend-

ed by act approved June 26, 1885, in force July 1, 1885, p. 64).

Section 1. *Be it enacted by the People of the State of Illinois, represented in General Assembly.* That in all cities, incorporated towns and villages where water works have been or may hereafter be constructed by any person or incorporated company, the city, town or village authorities in such cities, incorporated towns, and villages may contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years." (As amended by act approved June 30, 1885, in force July 1, 1885, L. 1885, p. 64).

Sec. 2. Any such city or village so contracting may levy and collect a tax on all taxable property within such city or village for the water so supplied."

"The second, passed one day later and taking effect on the same day as the first, was the cities, villages, and towns act. The title to that act and the article and section bearing upon this case are as follows: 'An act entitled, "An Act to provide for the incorporation of cities and villages."' (Approved April 10, 1872, in force July 1, 1872, Laws of 1871-2, p. 218).

"Article X. Section 1. The city council or board of trustees shall have the power to provide for a supply of water by boring and sinking artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordi-

nance, and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water and injuries to such wells, pumps, cisterns, reservoirs or water works."

"These acts are urged to establish the power in the village of Rogers Park to grant to the plaintiff in error the right to charge and collect for thirty years the rates prescribed by the ordinance of November, 1888. We have passed on a similar contention in *Freeport Water Co. v. Freeport*, 180 U. S. 587, ante, 679, 21 Sup. Ct. Rep. 493, and in *Danville Water Co. v. Danville*, 180 U. S. 619, ante 696, 21 Sup. Ct. Rep. 505, and we need not repeat the reasoning. Besides, it is disputable if the ordinance of 1888 justifies the claim of plaintiff in error. The Supreme Court of the state held that it did not. A strict construction must be exercised. The contract claimed concerned governmental functions, and such functions can not be held to have been stipulated away by doubtful or ambiguous provisions.

"Section 1 of the ordinance recites, 'that, in consideration of the public benefit to be derived therefrom, the village of Rogers Park, Illinois, hereby grants the exclusive right and privilege, for a period of thirty years * * * unto H. E. Keeler, his successor or assigns,' of erecting and maintaining a system of water works. The use of the streets was also granted for such purpose.

"Section 3 recites, 'in consideration of the public benefits and the protection of property resulting from the construction of said system of water works,' the village agrees to pay a certain annual rental proportional to the length of the mains.

"The grantee, on his part to pay 'all municipal and village taxes' (Section 3) 'in consideration of the rentals herein agreed to be paid and in consideration of the rights and privileges granted' (Section 4) agreed to furnish the village and the residents thereof an adequate supply of water. Failing to supply water for a year in quantity or quality stipulated, the 'franchise and all their rights and privileges granted under this ordinance, and the contract entered into, shall be null and void.'

"If the ordinance contained any other provisions it could not be claimed that the company's charges to consumers of the water furnished them were free from regulation by the municipality if it otherwise had power of regulation. There are other provisions, and especial stress is laid upon them. Section 12 provides as follows: 'The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and collect from him at meter rates, provided that in such cases the minimum annual rate paid by any one consumer shall be $5.' Then follows an enumeration of uses and the rates for such uses. There is a schedule for meter rates, and also the following provision: 'Rates for all other purposes that may be applied for, not named in the foregoing schedule of maximum rates, will be fixed by estimation or meter, at the option of the grantee or assigns.' This, it will be observed is the language of command, not of contract, of limitation on power, not a bargain giving power. The right to charge the inhabitants

of the village for the water supplied to them resulted from the right to construct and maintain the system. Section 12 was a regulation of the right. There is no stipulation that it will be the only instance of regulation; that the power to do so is bartered away; and that the conditions which determine and justified it in 1888 would remain standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us in so holding. The predecessor of the plaintiff in error was given the monopoly of the supply of water. That might be necessary to induce the investment of capital, and for its security the obligation of a contract might be sought and given. There was no such inducement for an unalterable rate. A reasonable rate the law insured, and assured even against governmental regulation. And the statute of 1891, which is especially complained of, assures it. By Section 1 of that statute municipalities are 'empowered to prescribe by ordinance maximum rates and charges,' and if unreasonable rates and charges be fixed they may be reviewed and determined by the Circuit Court of the county in which the municipality may be. There is no complaint in this case that the rates fixed by the ordinance of 1897, passed by the city council of Chicago, were unreasonable. Plaintiff in error relies strictly on a contractual right. We think it has no such right, and the judgment of the Supreme Court is affirmed."

Another case of equal interest is *Owensboro* v. *Owensboro Waterworks*, 191 U. S. 358, 48 L. ed. 217. On page 224 we find this language:

"But counsel go farther. They deny the right of the city to fix rates, and yet assert its power to enter into an irrevocable contract with the water company giving it such power, that is, giving it power to fix rates free from any regulation by the city, not only under any authority the city then possessed, but under any authority the city might be given by the legislature.

"In this contention there are several elements, but we pass their consideration, and determine what contract, if any, the city entered into with the water company. Of course, it is implied in the grant to the company that it might charge some rates to the consumers, but the question is, Were those rates exempt from regulation by the city under any power it then had or might be given? An affirmative answer is contended for by the appellee under Sections 9, 10, and 14 of the granting ordinance. Section 9 is the pivotal section. The others are complimentary. By it the company was given 'power and authority to make and enforce as a part of the condition upon which it will supply water to its consumers, all needful rules and regulations, not inconsistent with the law or provisions of this ordinance.' The section is concerned with the rules between the company and consumers alone. The company may enforce all needful rules and regulations as part of the condition upon which it will supply water. What is the other part of the condition? It must be the payment of rates, but to that part of the condition the power to make regulations does not apply. It would ignore the distinctions made by the section, and give, besides the words 'rules and regulations' too large a meaning to make them include the power of fixing rates to consum-

ers. They have adequate and useful signification without that. There were many things in the supply of water to consumers and in the orderly and prudent conduct of the business of the company which might need rules and regulations.

"And even so construed, the power conferred is not without limitation. The rules and regulations must not be inconsistent 'with the law,' and this means not only the law as it was when the ordinance was passed, but as the law might become. *Ruggles* v. *Illinois*, 108 U. S. 527, 27 L. Ed. 812, 2 Sup. Ct. Rep. 832; Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191. In the latter cases a grant of power to the railroad company was to make and prescribe such by-laws, rules, and regulations which the directors might deem needful and proper touching all matters whatsoever which might pertain to the concern of the company. The company was also given the power 'from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad.' From this grant of power it was claimed that the company had 'the right of managing its own affairs and regulating its charges for the transportation of persons and property, free of all legislative control.' Mr. Chief Justice Waite, speaking for the court, replied: 'This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power.'"

Stanislaus County v. *San Joaquin & K's R. C. & I. Co.*, 192 U. S. 201, 48 L. ed. 406, is another case on this question. In the opinion, Mr. Justice Peckham sets out a copy of the statutes in question. They are as follows:

> "The act of 1862 provided in Section 3 as follows: 'Every company organized as aforesaid shall have power, and the same is hereby granted, * * * to establish, collect and receive rates, water rents, or tolls, which shall be subject to regulation by the Board of Supervisors of the county or counties in which the work is situated, but which shall not be reduced by the supervisors so low as to yield to the stockholders less than 1½ per cent per month upon the capital actually invested.'" (Cal. Gen. Laws, 1850-1864, Sec. 978.)
>
> "On March 12, 1885, the legislature passed an act (Cal. Stat. 1885, p. 95), providing for the fixing, by the Board of Supervisors of the county, of the rates to be collected by water companies. Section 5 of that act authorized the various Boards of Supervisors in the state to regulate and control the water rates that might be charged in their respective counties by any person, company, association, or corporation, and provided: 'Said Board of Supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations and corporations so furnishing such water to such inhabitants shall be not less than 6 nor more than 18 per cent upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation

and furnishing of such water of each of such persons, companies, associations and corporations; but in estimating such net receipts and profits the cost of any extensions, enlargements, or other permanent improvements of such water rights or waterworks shall not be included as part of the said expenses of management, repairs and operating of such works, but when accomplished may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations and corporations, each of said Board of Supervisors may likewise take into estimation any and all facts, circumstances and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable and just, both to such persons, companies, associations and corporations and to said inhabitants."

In the opinion the learned justice uses this language:

"It seems to us that language of this nature cannot properly be construed as a promise or pledge that the limitations as to rates may not be altered at any time when, in the judgment of the legislature, it may be proper so to do. Water rates which might have been perfectly reasonable at the time of the passage of the Act of 1862, although amounting to 1½ per cent per month upon the capital actually invested, might, in the course of years, become exceedingly burdensome to those who used the water, and amount to a very unreasonable compensation to the company for the water it sold.

Irrigation by means of corporations formed to supply water was in its infancy in 1862 in California and the risks necessarily taken in the organization of such companies, and the prosecution of their work, were then not only very large, but also extremely uncertain in character. Consequently, a rate of compensation was proper at that time which, in the course of years and the accumulated experience as to the necessary cost of such works, and of their successful operation, including the consideration of the risk attendant upon their operation would make a water rate, as provided by the act of 1862, a very unreasonable over-charge. These facts must have been present in the minds of those who enacted the legislation of 1862, and it would be most unreasonable to suppose that it was intended by any such legislation to forever thereafter tie the hands of the state in regard to all companies organized under the Act of 1862, and before the passage of the Act of 1885.

"The authority given by the Act of 1862 enabled the Board of Supervisors to conditionally regulate the rates. There is no promise made in the act that the legislature would not itself subsequently alter that authority. The state simply authorized its agents, the Board of Supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be 'implied that the state might not thereafter authorize the Boards to reduce them, or that it might not itself do so directly. Even as between individuals, such an implication would not be a reasonable one from the language used, and as the contract, if it existed, would take away from

the legislature its otherwise undoubted right of regulation upon a subject of great public importance, there is still less reason for implying a contract which would prevent the state from using its power to that end for the future. The language of this portion of the act applies to the Boards and limits their right of reduction, leaving unhampered the right of the state to interfere directly or by authorizing the Boards to reduce the rates below the point stated in the act. In order to make such contract the language must be plain, and susceptible of no other reasonable construction."

In *Water, Light & Gas Co. v. City of Hutchinson*, 207 U. S. 385, 52 L. ed. 257, Mr. Justice McKenna, on page 262, L. ed., uses this language:

"That grants to municipal corporations, like grants to private corporations, are subject to the rule of strict construction, was announced by this court in *Detroit Citizens' Street R. Co. v. Detroit R. Co.*, 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732, following and applying the doctrine of previous cases. It was said that the power to grant an exclusive privilege must be expressly given, or if inferred from other powers, must be indispensable to them, and that this principle was firmly fixed by authority. See, also, Dill. Mun. Corp., 4th ed., Sec. 80. The case was concerned with a grant to a street railway, and, in the argument of the cases at bar, a distinction is asserted between an exclusive privilege to occupy the surface of streets and interfere with 'a matter of common right,' and a privilege to use the streets below the surface 'as inci-

dental only and subsidiary to the performance of a contract pertaining to another matter'; and on this distinction it is argued, the 'first must show an express grant of authority' to make the right exclusive, but that the second is not limited by such requirement. The distinction is only one of degree, and has not been considered as varying the application of the rule of construction announced. In *Freeport Water Co.* v. *Freeport*, 180 U. S. 598, 45 L. ed. 688, 21 Sup. Ct. Rep. 497, a statute of Illinois was considered which gave power to cities and villages to provide for the supply of water at such rates as might be fixed by ordinance and for a period not exceeding thirty years. And passing upon these provisions as constituting a contract precluding a change of rates from time to time, we said: 'The rule which governs interpretation in such cases has often been declared. We expressed it, following many prior decisions, in *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.*, *supra*, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them."

The Encyclopedia of United States Supreme Court Reports, Volume 6, page 804, gives a brief statement of the principles declared by this court on this point.

"In order to make a contract between the state and a corporation not to regulate the rates of a water company, chartered by it, the language must be plain and susceptible of no other reasonable con-

struction. As a general rule the language of such statutes does not and is not intended to form a contract, but simply amounts to the then pleasure of the legislature, to so remain until subsequently altered by it. A mere reduction of rates, while still leaving reasonable, fair or just compensation for the use of the property, is not prohibited."

Vol. 9, U. S. Ency., page 538, reads:

"Where private property is devoted to a use in which the public has an interest, a state legislature has the authority where its powers have not been restrained by contract, to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold, upon the ground that the public may not rightfully be required to submit to unreasonable exactions, provided the charges fixed by the statute are not unreasonable, and property is not taken without due process of law, and there has been no denial of the equal protection of the laws. Indeed, this power is inherent in every sovereignty, and has been exercised from time immemorial. And this power to regulate is a power of government continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt it must be resolved in favor of the existence of power. But this power of limitation or regulation is not itself without limit. This power to regulate is not a power of regulating to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the state can not require a railroad corporation to carry persons or property without reward. Neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

Vol. 11, U. S. Ency., page 990, reads:

"The power of regulation of water rates is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power."

Construction of Section 170-A, Chapter 122 Laws of 1903.

The plaintiff in error assumes that the words "on such terms and conditions as may be agreed to by said mayor and council and such person, firm or corporation" applies to and enlarges the whole of the preceding sentence. Such is not our reading of the sentence. This sentence, taking it as a whole, should, in our opinion, be read as follows:

"Nothing in this act shall be construed as prohibiting any city governed by the provisions of this act, from granting, and the mayor and council are hereby authorized to grant to any person, firm or corporation,

(1) to construct, maintain and operate a natural gas plant for the purpose of furnishing to said city and its inhabitants natural gas for lights, fuel and all other purposes.

A Franchise

(2) with authority to lay and maintain all necessary mains and pipes in the streets, avenues and alleys and public grounds of such city, on such terms and conditions as may be agreed to by said mayor and council, and such person, firm or corporation.

Provided that such franchise shall not continue for a period longer than twenty years."

The above is a literal and exact copy of the statute, without the transposition of a word. As so read can anyone doubt for an instant that the authority attempted to be exercised in this case if the franchise is interpreted as a binding contract was in excess of power? The pipes might be laid in the streets, alleys and public grounds, upon such terms and conditions with reference to mains and pipes as might be agreed to; for instance, in the event that pipes were placed in paved streets, the pavement should be relaid; the company should be responsible for accidents occurring by its neglect; proper lights and barriers should be placed to protect excavations; in the event a street is to be paved, that the company shall lay its mains before the pavement is laid; it shall maintain its mains in such condition that leakage shall be reduced to a minimum. Are not these the terms and conditions that the legislature meant to authorize the city to require of the company, and not the bargaining away of the sovereign power of the State of Kansas to supervise for itself the rates for natural gas? See *In re Pryor, supra.*

To give the construction sought by the plaintiff in error will require not only the setting aside of the principle of construction formerly governing in these cases, but the substitution of a new principle, that, in the absence of a legislative prohibition, the power to contract

away the right to regulate rates may be exercised by municipal corporations.

Or this construction might be given to the sentence: "The City is given the power to grant a franchise

(a) to construct, maintain and operate a natural gas plant, for the purpose of furnishing said city and its inhabitants natural gas for lights, fuel, and all other purposes.

(b) with authority (that is the City may authorize the company) to lay and maintain all necessary mains and pipes in the streets, avenues, and alleys, and public grounds of such City,

on such terms and conditions as may be agreed to by said mayor and council, and such person, firm or corporation."

It will be noted that the legislature specifically delegates to the city the enumerated powers—to grant a franchise to construct, maintain, and operate a natural gas plant; and to permit the use of the streets, alleys and public grounds of such city for the laying of all necessary pipes. Such specified rights to be granted on terms and conditions to be agreed upon. Does this latter expression surrender to the city all power that the state possesses over rates, or does it imply that in granting the specified rights to a natural gas company to use the streets and to operate a plant, the city might *require of such company such terms as it* might agree to? If the effect sought by plaintiff in error be given to this sentence,

then why was it necessary that the State of Kansas should specifically enumerate the specific powers of government that might be exercised? If this sentence read, "the City shall have power to grant a franchise to a natural gas company upon terms and conditions to be agreed to," it would be one thing; but in this case the state specifically enumerated the *governmental powers* which might be the subject of the franchise, and the rates to be charged are not mentioned. See *In re* Pryor, *supra*, pp. 24-28.

Construction of Section 170-A, Chapter 122, Laws of 1903 by the Supreme Court of Kansas.

The Supreme Court of Kansas has construed the language in Section 170-A, upon which section the right of appellant to claim a contract rests, as follows (See Transcript of Record 59):

> Section 170-A of the act provides for granting a franchise to construct, maintain and operate a natural gas plant for the purpose of furnishing the city and its inhabitants natural gas for light, fuel, and all other purposes, with authority to lay or maintain all necessary mains and pipes in the streets, avenues, alleys, and public grounds of said city on such terms and conditions as may be agreed to by the mayor and council and such person, company or corporation.
>
> In accordance with the rule of construction laid down in *Freeport Water Company* v. *Freeport*, 180

U. S. 577, and other authorities cited, *infra*, the clause 'that such franchise shall not continue for a longer period than twenty years' qualifies the clause, 'to lay and maintain all necessary mains, etc.' and not the clause, 'on such terms and conditions as may be agreed to by said mayor and council and such person, firm or corporation.' If it were intended to convey the right to fix by agreement or contract with the public utility the rates to be charged for the service, such intent cannot be found in the language employed.

If the provisions of Section 170-A are ambiguous, and it is a matter of doubt whether the construction above given of the terms thereof is correct, or whether as contended by appellant the city was thereby authorized to contract and fix the rates for such service on such terms and conditions as may be agreed to, the doubt must be resolved in favor of the public and not in favor of appellant.

Freeport Water Co. v. *Freeport, supra.*

Certainly the reasoning of the Supreme Court of Kansas cannot be successfully assailed. But even doubt as to the correctness of the conclusion reached is insufficient. This court has held in an opinion by Mr. Justice Bradley in *Burgess* v. *Seligman*, 107 U. S. 20 (27 L. Ed. 359), in considering this class of cases:

> For the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt. Acting upon these principles founded as they are on comity and good sense, the courts of the United

States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the state courts."

The above language is quoted with approval in the case of *Freeport Water Co.* v. *Freeport, supra.*

Even if the words "upon such terms and conditions as may be agreed to" by any construction could be held to authorize the use by the city of the sovereign power of the state to regulate rates (which we deny), it can be construed in four other ways, in each of which the surrender of the sovereign power of the State of Kansas over rates is not necessary. So at the very best the language used, being susceptible of different meanings, is ambiguous.

Construction of Various Acts Governing Cities of the First Class.

But to determine the power of the city we must examine all of the statutes in force and give effect to all.

The various statutes—parts of Chapter 122 Laws of 1903 are to give them even the most favorable construction contended for by plaintiff in error—conflicting and ambiguous. Section 51, Chapter 122, as enlarged by Section 21, of said chapter, authorizes the enactment of ordinances *fixing rates* for all water, electric light, heat, power, *gas*, telephone service, *or any other commodity or service furnished to such city, or any of its inhabitants, with power to amend, modify or repeal such ordinances.* Section 170 expressly reserves the

power to the city to at all times during the existence of any grant to lay pipes through the streets for gas or heat, to fix by ordinance a reasonable schedule of maximum rates. Even if it should be conceded that Section 170-A could be held to authorize the making of a contract if it stood alone, yet when considering such section with the other sections of the same act, doubt must arise as to the intent of the Legislature. There is certainly, if the plaintiff in error is right in his construction of 170-A, ambiguity and conflict and such ambiguity and conflict must be construed in favor of the public. This court in the case of *Freeport Water Co.* v. *Freeport, supra*, held with reference to certain statutes of Illinois there under consideration:

> The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public, the court applied the rule declared in many cases. We said in the Railroad Commission Cases, 116 U. S. 307, sub. nom. *Stone* v. *Farmers Loan and T. Co.*, 29 L. Ed. 636, 6 Sup. Ct. Rep. 334-338, by Chief Justice Waite, of the power of regulation of rates:
>
> "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of such power. In the words of Chief Justice Marshall in *Providence Bank* v. *Billings*, 4 Pet. 514, 561, (7 L. Ed. 939-955), 'its

abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous."

Discussion of Cases Cited by Plaintiff in Error.

The case of *Vicksburg* v. *Vicksburg Water Company*, 206 U. S. 496.

The plaintiff in error in his brief relies upon the case of *Vicksburg* v. *Vicksburg Water Company*, 206 U. S. 496, 27 Supt. Ct. 766, 51 L. Ed. 1155, as establishing his right to a reversal of the judgment rendered by the District Court of Wyandotte County, Kansas. It is asserted in the brief filed in this court, that the rule established in the Freeport case is modified or limited in the Vicksburg case.

As we read the Vicksburg case, no such effect can be given to the decision.

The decision in the Vicksburg case was rendered, not exactly upon the judgment of this tribunal as to the effect of the laws of Mississippi, but upon the meaning and effect of the prior decisions of the courts of Mississippi, particularly the decisions rendered prior to the making of the contract. The Supreme Court of Mississippi held, prior to the decision of this court, that the ordinance sued upon was an irrepealable contract, and this court said:

That a state may in matters of proprietary rights exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt. *Los Angeles* v. *Los Angeles Water Company*, 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. Rep. 736; *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1-7, 43 L. Ed. 341-344, 19 Sup. Ct. Rep. 77; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674, 29 L. Ed. 525, 6 Sup. Ct. Rep. 273; *Freeport Water Company* v. *Freeport*, 180 U. S. 587-593, 45 L. Ed. 679-686, 21 Supt. Ct. Rep. 493.

In the latter case this court following the construction of the Supreme Court of Illinois, held that where a city council was authorized to contract with any person or corporation to construct or maintain water works at such rates as may be fixed by ordinance for a period not exceeding thirty years, the words, "fixed by ordinance" being capable of application so as to make one ordinance endure for a period of thirty years, for which the contract was made, or to give the right to pass ordinances from time to time regulating rates, the latter construction was adopted.

In the cases generally in this court, it will be found that in determining the matter of contract, the local decisions have been given much weight and ordinarily followed. As this is a Mississippi contract, and the power was exercised under the authority of an act of the Legislature of that state, we naturally look to the decisions of the courts

> of that state, particularly to such as had given construction to similar charters at the time the contract was made, with a view to determining the extent of the power conferred.

This court after considering at some length the decisions of Mississippi, touching upon the matters before the court, concludes:

> In the light of these decisions, and others that might be cited, we reach the conclusion, etc.

Certainly when the Vicksburg decision is understood it cannot be claimed that it in any manner limits the decision in the Freeport case. The fact that under the declared policy of the State of Mississippi, certain language is held to authorize the making of a contract, is sufficient reason why this court should thereafter uphold the decision of the Supreme Court of that state in deciding a contract was authorized by such language. On the other hand if the Supreme Court of Mississippi had for years, and in an unbroken line of decisions, held that no irrepealable contract could be made, an agreement made in the light of such decisions would undoubtedly be held void. As the court held in the Freeport case, *supra*, when announcing that irrepealable contracts might be made.

> We do not mean to say that if it was the declared policy of this state that the power of alienation of a governmental function did not exist, a subsequently asserted contract would not be controlled by such policy.

The case of *Detroit* v. *Detroit Citizens Street Ry. Co.*, 184 U. S. 368, 46 L. Ed. 592, 22 Sup. Ct. Rep. 410, is a case cited by the plaintiff in error, as in support of his position that the language found in Section 170-A, Chapter 122, Laws of 1903, authorizes the making of a contract fixing a schedule of rates increasing in succeeding years.

We think a very important distinction in the cases is apparent.

In the Detroit case in Section 13 of the act under which authority was granted to the City of Detroit to enact an ordinance for the construction and operation of a street railway system, it was enacted that such franchise should be, "upon such terms and conditions as may be agreed upon by the company and the township board of the township."

But by the provisions of the same act and in Section 20 thereof, it was further provided:

> Section 20. The rate of toll or fare which any street railway company may charge for the transportation of persons or passengers over their road, shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and shall not be increased without the consent of such authorities.

It would be difficult indeed to conceive how it would be possible for a state Legislature to more clearly express an intention that rates should establish by agreement in language plainer than that found in Section 20 of the act, and it is upon the power conferred in Section 20,

not the power conferred in Section 13 that the decision is based.

There is this important distinction between the Detroit case and this case. In the Detroit case it was expressly and explicitly declared by statute that the agreement might cover rates, while in this case no such declaration may be found. As a matter of fact, if the Detroit case is authority for any proposition connected with this case, it is against the plaintiff in error. For, if the language found in Section 13 in the Detroit case is to be given the construction claimed for Section 170-A in this case by plaintiff in error, then why would it have been necessary for the Legislature to make specific provision for including in the agreement the establishment of rates?

In the case of *Omaha Water Co. v. City of Omaha*, 147 Fed. 1, which is cited by the plaintiff in error, the Circuit Court of Appeals of the United States for the Eighth Circuit, held that under authority of an act of the legislature of Nebraska in the following terms,

> "The mayor and council of each city governed by said act shall have power to contract with and procure individuals or incorporators to construct and maintain waterworks on such terms and under such regulations as may be agreed on,

the City was empowered to make a contract fixing rates.

There is this distinction between the Omaha case and this case.

1. In the Omaha case direct authority was granted to the city to contract with individuals or corporations to construct and maintain waterworks on such terms and under such regulations as may be agreed on. In this case the authority given is to grant a franchise to construct, maintain and operate a natural gas plant, *with authority* to lay and maintain all necessary pipes in the streets, avenues and public grounds of said city, on such terms and conditions as may be agreed to by said mayor and council, and such person, company or corporation. The words commencing "with authority" are a limitation upon the general power given to grant a franchise, and the expression "upon such terms and conditions" as used in the Kansas Act cannot be held to enlarge the specific power granted to cities; that is, the mere power to permit the company to use the streets.

2. In the opinion of the Circuit Court of Appeals in the Omaha case, not even one decision from the courts of Nebraska was considered. It must be assumed (for the rule is well established that prior decisions establishing principles of construction are binding) that the courts of Nebraska had never passed upon the principle in that case, or if they had they were in line with the decisions of the Court of Appeals. In this case the Supreme Court of Kansas has not only decided this particular case adverse to the claim of plaintiff in error, but in an unbroken line of decisions from the 1st Kansas down, the principle of strict construction and non-dele-

gation of powers not specifically conferred has been established.

The case of *Minneapolis* v. *Minneapolis Street R. Co.*, 215 U. S. 417, 54 L. Ed. 259, is also cited by the plaintiff in error as in support of its contention. In the Minneapolis case, which was an appeal from the United States Circuit Court, the franchise or contract granted by the City by special act of the legislature was validated. The question before this court was the effect of the contract, its validity having been confirmed after it was made. The court held the contract to be irrepealable.

Nothing decided in that case, as we understand it, establishes any principle governing this case.

The case of *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1, 43 L. Ed. 341, is also cited by the plaintiff in error as establishing his position. This case was one wherein the city made a contract in pursuance of statutory authority with a water company, agreeing among other things not to erect a works of its own; this provision of the contract was held good.

The question of rates was not before the court, and the decision establishes no principle which is of weight in this case.

We repeat the statutes hereinbefore set out do not give to cities the power to grant franchises fixing rates and to take such rates out of the future control of the city and the state. The decisions of the United States Supreme Court and of the State of Kansas declare emphatically, and without qualification, that this right

must be expressly conferred upon the cities by statutes.

That right has not been conferred upon Kansas City, Kansas. It did not exist at the time of granting this franchise.

The city, therefore, could not grant a franchise and in that franchise prescribe rates in such a way as to abrogate the power of the city to thereafter control rates or to abrogate the power of the state to control such rates, if the state at some future time desires to take from the city the control over rates and vest that power in some other tribunal.

The Rates in Rosedale, Kansas.

The provisions of the franchise granted by Rosedale are clear. No higher rate shall be charged in such city than is charged in Kansas City. If the legal rate in Kansas City is twenty-five cents per thousand cubic feet, then such is the legal rate in Rosedale. If twenty-seven cents is the lawful rate in Kansas City, then it is likewise the lawful rate in Rosedale.

Clearly no federal question is presented on this point, and we anticipate no difference of opinion as between the parties to this litigation on this point.

The State of Kansas cannot made an irrepealable contract fixing rates—neither can it authorize a municipality to make such a contract.

While we are very clear that no contract was attempted to be authorized by the legislature of Kansas permitting the fixing of the rate to be charged by the

Wyandotte County Gas Company in Kansas City, Kansas—yet if it should appear to the court that such an authority was attempted we desire to present our views as to the limitation upon legislative power found in the constitution of Kansas.

Section one of Article XII of the Constitution of Kansas provides:

> "The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

Under this provision of the Constitution, the state has reserved to the legislature the power to alter, amend, or repeal any charter granting to cities the power to contract, supervise or control public utilities.

The cities of Kansas and all persons dealing with them must take notice of this constitutional provision and of the power reserved in the legislature to make changes in charter provisions, which changes may affect the rights of individuals and of corporations dealing with those cities.

The power reserved in the state, under provisions similar to the constitutional provision above quoted, has frequently been before this court for review.

In the case of *Stanslaus County* v. *San Joaquin & Ks. R. C. & I. Co.*, 192 U. S. 211 (48 L. Ed. 412), this court held an act of the legislature of California, reducing the earnings of the company from a maximum of eighteen per cent to six per cent per annum, was within

the power reserved by the state under the provision of the Constitution of the state, Article 4, Section 31, which reads as follows:

> Corporations may be formed under general laws, and shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

This court in the opinion says:

> This court has had frequent occasion to discuss the meaning and extent of the power thus reserved, as it exists in about all the states, either by constitutional or statutory provisions.
>
> *Tomlinson* v. *Jessup*, 15 Wall. 454, 21 L. Ed. 204, held that the object of reserving a power to amend or repeal (p. 458, L. Ed. p. 206) was:
>
> "To prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which, without that provision, would be irrepealable, and protected from any measures affecting its obligation."

It was also said (p. 459, L. Ed. p. 206):

> "The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities, derived by its charter directly from the state."

In *Shields* v. *Ohio*, 95 U. S. 319, 24 L. Ed. 357, it was stated that by virtue of the power to alter, revoke, or repeal an act, as provided in the Constitution of Ohio, Par. 2, Article 1, the legislature did not impair the obligation of a contract in prescribing rates for passenger transportation by a new consolidated company, although one of the original companies, prior to the adoption of the Constitution, was organized under a charter which imposed no limitation as to rates.

In *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 27 L. Ed. 408, 2 Sup. Ct. Rep. 267, it was again held that a power reserved in the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of the charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.

The same principle was decided in Sinking Fund Cases, 99 U. S. 700, 720, 25 L. Ed. 496, 501; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. Ed. 269, 14 Sup. Ct. Rep. 437, and *United States* v. *Union P. R. Co.*, 160 U. S. 1, 33, 40 L. Ed. 319, 330, 16 Sup. Ct. Rep. 190.

Covington v. *Kentucky*, 173 U. S. 231, 43 L. Ed. 679, 19 Sup. Ct. Rep. 383, decided that language describing certain property, and providing that it should be and remain forever exempt from state, county, and city tax, did not prevent the legislature from withdrawing such exemption, and subjecting the property to taxation, in view of the

statute that all charters and grants of the corporations should be subject to amendment or repeal at will of the legislature. Mr. Justice Harlan, in delivering the opinion of the court, said (p. 238, L. Ed. p. 682, Sup. Ct. Rep. p. 386):

"We are of the opinion that the exemption from taxation embodied in that act did not tie the hands of the commonwealth of Kentucky so that it could not, by legislation, withdraw such exemption, and subject the property in question to taxation. The Act of 1886 was passed subject to the provision in a general statute of Kentucky, above referred to, that all statutes 'shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed.' If that act in any sense constituted a contract between the city and the commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract."

To the same effect is *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531.

These cases also hold that there is a limitation, even to the power of amendment, when reserved in the constitution or a statute of a state. Some of the cases, although holding that the power to amend or repeal was properly exercised in them, also state that the power is not without limit; that the alterations must be reasonably made, in good faith, and consistent with the scope and object of the act of incorporation, and that sheer oppression and wrong could not be inflicted under the guise of amendment

or alteration; that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases are surrounded by the same sanction and are as inviolable as in other cases. In reiterating this view of the power, we think that a mere reduction of rates, while still leaving reasonable, fair, or just compensation for the use of the property, is not prohibited, and we are quite clear that, even assuming there was a contract, the legislature nevertheless had the power to so alter and amend the act of 1862 as to provide for the fixing of rates as set forth in the act of 1885.

It is not confiscation, nor the taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of 6 percent upon the then value of the property actually used for the purpose of supplying water as provided by law, even though the company had, prior thereto, been allowed to fix rates that would secure to it 1½ percent a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract, providing that a certain compensation should always be received, we think that a law which reduces the compensation theretofore allowed to 6 percent upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of confiscation about it.

In the case of *Atchison* v. *Bartholow*, 4 Kansas 125, the Supreme Court of Kansas held that Section One of Article XII of the Constitution applied to municipal corporations.

To the same effect is the holding in the case of *Gray* v. *Crockett*, 30 Kansas 143.

Valid provisions in the franchise of a public service corporation are the equivalent of charter grants direct from the state. The state, as such, could grant no charter which would be unalterable and irrepealable, hence it cannot delegate to a municipal corporation, power which it does not possess for itself.

People v. *R. R. Co.*, 178 Ill. 594.
Grosses Points v. *R. R.*, 130 Mch. 363.
City of Lansing v. *R. R. Co.*, 109 Mich. 121-127.
State ex rel. v. *R. R. Co.*, 72 Wis. 612.
Sioux City R. R. v. *Sioux City*, 138 U. S. 98.
Selectmen of Clinton v. *R. R. Co.*, 197 Mass. 279-285.
Cleveland v. *R. R.*, 194 U. S. 517-534.
Fath v. *R. R.*, 105 Mo. 535-548.
City of Detroit v. *R. R.*, 95 Mich. 456-461.

This is true for the reason that in imposing such conditions the city is acting as an agent of the State in exercising its sovereign power.

In *Sioux City R. R.* v. *Sioux City*, 138 U. S. 98, 108, it was said that a franchise granted by a city under authority from the state had the same effect as if directly granted by the state.

In *Cleveland* v. *R. R.*, 194 U. S. 517, 534, the court said that, in passing ordinances under such power, the city "was exercising a portion of the authority of the state, as an agency of the state."

In *State ex rel.* v. *R. R.*, 72 Wis. 612, the court said: "What the Common Council does within that power is done by the legislature through its agency."

In *City of Detroit* v. *Detroit R. R.*, 56 Fed. Rep. 867, 880, Judge Taft said that the condition though named by the city was imposed by the state.

To the same effect are *Blodgett* v. *Worchester R. R.*, 192 Mass. 106, and *Alleghany City* v. *R. R.*, 159 Pa. St., 411, 415.

The *City of Detroit* v. *R. R.*, 95 Mich. 456, 461, the court said:

> While it is true that ordinances of this class have been held to partake of the nature of contracts, yet they are none the less by-laws, and have the force and effect, *in favor of the municipality, and against persons bound thereby, of laws passed by the legislature.*

In *Citizens' Horse Railway Co.* v. *Belleville*, 47 Ill. App. 388, it was held that the consent of the city had the same effect as the grant by the state, and formed a part of it.

In *City of Lansing* v. *R. R.*, 109 Mich. 121, 127, the court said that the conditions imposed by the city "are as binding as though imposed in the statute."

In *People ex rel.* v. *R. R.*, 178 Ill. 594, the court said:

> "Such power thus delegated is exercised by the municipal authorities acting in behalf of the state for the benefit of the public."

It may be said to be elementary that in conferring a franchise to use the streets, in the exercise of its delegated authority from the legislature, a city's common council act on behalf of the state as its agents, and not as agents of the municipal corporation. The duty of protecting the public streets for public travel is a public and not a corporate duty.

Schultz v. *Milwaukee*, 49 Wis. 259.
Little v. *Madison*, 49 Wis. 605.
Williams v. *Yorkville*, 59 Wis. 119.
Kittredge v. *Milwaukee*, 26 Wis. 46-50.
Griggs v. *Foote*, 4 Allen, 195.
Manners v. *Haverhill*, 135 Mass. 165.
McCarty v. *Boston*, 135 Mass. 197.
People ex rel. v. *Auditors*, 75 N. Y. 316.
Transportation Co. v. *Chicago*, 99 U. S. 635.
Smith v. *Washington*, 20 How. (U. S.), 135.

The state may fix in the company's charter the rates to be charged by it, and the rates thus fixed will be binding upon the company (*i. e.*, the company cannot exceed those rates), though the state may reserve the power to reduce the rates.

Grand Rapids, etc., R. R. v. *Osborn*, 193 U. S. 17, 29.
Louisville & N. R. R. v. *Kentucky*, 183 U. S. 503.
Reagan v. *Farmers' L. & T. Co.*, 154 U. S. 362.
Ashley v. *Ryan*, 153 U. S. 436.

In *Grand Rapids, etc., R. R.* v. *Osborne, supra*, Mr. Justice White, now chief justice (who wrote the court's opinion), said:

> Having voluntarily accepted the privileges and benefits of the incorporation laws of Michigan, the company was bound by the provisions of the existing laws regulating rates and fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. *Daniels* v. *Yearney*, 102 U. S. 415, and cases cited. That a corporation may contract with a municipality or a state to operate a railroad at agreed rates is unquestionable.

In *Louisville & N. R. R. Co.* v. *Kentucky, supra*, Mr. Justice Shiras (who whote the court's opinion), said:

> We do not put the disability of the company to raise these questions upon the ground of an estoppel, strictly speaking, but upon the proposition that the company takes and holds its franchises and property subject to the conditions and limitations imposed by the state in its (the company's) constitution (*i. e.* charter).

In *People ex rel.* v. *R. R.*, 178 Ill. 594 (one of the cases cited), it was said:

> The ordinance, the acceptance thereof and the enjoyment of the benefits of its provisions by the respondent company must be regarded as establishing, so far as the respondent company is concerned, and as estopping it to deny, that the ex-

> action of a greater sum for the transportation of passengers * * * is an unreasonable exaction and unjust discrimination.

Therefore, if it be true that in the exercise of the right to grant franchises, the cities act as governmental agencies—the rights granted being in fact charter powers—it must follow without doubt that the state possesses the power to amend the rights granted.

In the Stanslaus County case *supra*, this court held that the right granted to a corporation to earn eighteen percent per annum, was not a vested right under the Constitution of the United States; that the rate of earnings might be reduced to such rate as is now customary and proper. Can it make any difference that the right granted in the Stanslaus County case was a direct grant from the legislature—if the legislature indirectly, through a municipal corporation or other subordinate body, had granted a franchise (which is a charter) must not the same rule apply?

Does the fact that the rate in the Stanslaus County case was measured upon a return upon the capital invested, rather than upon the unit of service, change the rule?

Clearly not.

The power reserved, as this court said in the Stanslaus County case, is not an arbitrary power; not a power which may be used oppressively, but a power to be exercised in the spirit of justice and equity, both to the public and the corporation.

Manifestly a contract with a fixed schedule of rates for twenty years for gas, electricity, or any other public utility, would in all probability prove unfair long before the expiration of the term of the contract. The states have, until late years, suffered from the conviction that public utilities could not be successfully regulated; that contracts were necessary. The states are not to-day suffering from any such conviction.

The modern idea of a Public Utilities Commission, now adopted in many of the states, has proven the ability of the state to regulate—and contracts in the old sense of the term are not now considered indispensable.

Rates—Effect of Public Utilities Act.

The Public Utilities Act, Chapter 238, Laws of 1911, in Section 30 thereof, prohibits the collection of a greater compensation for any service than the charge fixed for the same service on the first day of January, A. D., 1911.

It is conceded that the charge fixed (the price collected) on January 1, 1911, in this case was twenty-five cents. The sole point is the interpretation of the statute. No federal question is involved.

If the State of Kansas could under the constitution and did by statute authorize the making of a contract, establishing rates, and such valid contract was made, all prior to the passage of the Public Utilities Act, of course, this provision of the act could not be extended to such contract. But such is not this case.

As to the Jurisdiction of the Public Utilities Commission.

The Supreme Court of Kansas held in this case that the Wyandotte County Gas Company was subject to the jurisdiction of the Public Utilities Commission of the State of Kansas.

Clearly the city made no contract which attempted to guarantee to the Wyandotte County Gas Company that it would remain subject to the regulation and jurisdiction of the city.

No such contract could be made.

The Constitution of Kansas specifically authorizes the amendment or repeal of corporate charters. This has been held to apply to cities. So the Gas Company must in its dealings with the city have known that the state might elect to choose some agency other than the city to supervise the relationship. 69 Kansas, 97.

No rights which might even remotely be classed as vested were conferred upon the Gas Company, guarantying that the arrangement at the time made would continue in force.

Under the powers granted the state as principal, authorized the city as its agency to permit the Gas Company to lay its pipes in the streets and alleys. This right may not be taken away from the Gas Company. The city at that time had the right to regulate the rates to be charged by public utilities. The taking of this right from the city does not affect the Gas Company. Even the city would not be heard to complain and clearly if it can not, then the company can not.

A very much stronger case than this one was presented to this court in the case of *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 28 L. Ed. 173, the head notes in which case are as follows:

> Water companies in California formed under the Act of 1858, before the adoption of the constitution of 1879, have no right which the state is prohibited by the Constitution of the United States from impairing or taking away; to charge their consumers such prices for water as may from time to time be fixed by a commission made up of two persons selected by the company, two by the public authorities of the locality, and if need be, by a fifth, selected by the other four, or by the sheriff of the county.
>
> The state has power, notwithstanding the Constitution of the United States, to substitute for this commission another, selected without the co-operation of the company or some other tribunal of a different character, like the municipal authorities of the locality.

Volume 9, Encyclopedia, U. S. Sup. Ct. Rep. page 498, declares the rule with respect to the regulation of public utilities to be:

> In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes.

In a note found on page 854, 6 Ency. U. S. Sup. Ct. Rep. we find this language:

> No one has a vested right in a rule of law. The act of the State of Louisiana abolishing the police organization established in 1868, and vesting in the City of New Orleans the function of maintaining its own police force, was essentially a mere change of an instrumentality of municipal government. In making the change no obligation rested upon the state to create an independent successor of the police board or to provide for the payment of its debts, existing laws were ample for that purpose. The legislation was in the exercise of the state's power and not in contravention of the Constitution of the United States.

In *Louisville & Nashville R. C.* v. *Motley*, 31 Sup. Ct. Rep. 265, we find this in the syllabus:

> An interstate carrier can not make a valid contract to issue annual passes for life in consideration of a release of a claim for damages since the enactment of the Act of June 29, 1906, Section 6 expressly prohibiting any carrier from demanding, collecting or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in its published schedule of rates.
>
> Congress, in the exercise of its power over commerce, could enact the provisions of the act of June 26, 1906, Section 6, which rendered unenforcible a prior contract, valid when made, by which an interstate carrier agreed to issue annual

passes for life in consideration of a release of a claim for damages.

The constitutional liberty of the citizen to make contracts was not infringed by the enactment by Congress, in the exercise of its power over commerce, of the provisions of the act of June 29, 1906, section 6, which rendered unenforcible a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages.

A case that should not be overlooked in the consideration of this particular question is *Northern Pacific Ry. Co. v. State of Minnesota*, 208 U. S. 583, 52 L. Ed. 630. The head notes as found in the law edition are as follows:

Municipal legislation carried into effect by mandamus, which requires a railroad company to make repairs in a viaduct at its own expense, in accordance with plans adopted and approved by the municipal council, can not be regarded as a mere repudiation by the municipality of its agreement to maintain the viaduct, so as to defeat the appellate jurisdiction of the Supreme Court of the United States over a state court, invoked on the ground that contract obligations were thereby impaired.

Requiring a railroad company to repair, at its own expense, a viaduct and its approaches, built to carry over a railroad a street which was not extended over the right of way until after the railroad was built, can not be said to impair the obligation of a contract by which the municipality, in consideration of a contribution from the railroad company

toward the expense of the original construction, agreed to maintain the viaduct for fifteen years, and to maintain the approaches perpetually, where the highest state court, consistently with its earlier decisions, holds that the railway charter, as well as the common law, requires the railway company to construct and maintain suitable crossings at existing and future streets, and that any contract limiting the exercise of legislative power in this regard is void as against public policy, although there may have been some doubt when the contract was made as to what the rights of the parties were, and the contract may have been a compromise.

The rates in the franchise are maximum rates, therefore, subject to regulation and reduction.

In the Kansas City, Missouri, ordinance upon which plaintiff in error relies as establishing a contract fixing rates the following provisions is made:

> "The said grantee shall be entitled to charge and collect from such consumers of such gas, during the period of five years from and after natural gas is first furnished hereunder *at the rate of not to exceed twenty-five (25) cents per thousand cubic feet* and during the period of five years next thereafter *at the rate of not to exceed twenty-seven (27) cents per thousand cubic feet,*" etc. (Transcript of Record 31).

The same language is found in the Kansas City, Kansas, contract except the prices are higher and the periods of shorter duration. The Kansas City, Kansas, contract is of course limited by the Missouri contract.

It will be noted that the maximum rate for each period is fixed—*the exact rate is not fixed.*

In the case of *Detroit* v. *Detroit St. R. Co.*, 184 U S., l. c. 389, 46 L. Ed., l. c. 608, this court held that an ordinance which provided that the rate of fare for street railway service should not be more than five cents to each passenger, gave to the company the right by contract to fix the rate at five cents and that no power was reserved in the city to reduce the rate below five cents. However, in the Detroit case, as in all cases, the contract between a municipality and the utility was measured by the power granted to the municipality to make a contract. In the Detroit case the Legislature of Michigan, by express language, authorized the establishment of rates of fare for street railway companies by agreement between the city and the utility and in no other way. It is certain that in that case the agreement made authorized the fixing of the fare at five cents and until another agreement was made which requires, of course, the consent of both parties, the rate of fare must remain at the price fixed by the first agreement. In this case the franchise must, as in the Detroit case, be measured by the power granted by statute, and if we are correct in our position, as we feel that we are, that in Section 21 and 51 of Chapter 122 of the Laws of 1903, the same being Sections 883 and 913 General Statutes of 1909, the power is reserved to the city. "To prescribe and fix maximum rates and charges and regulate collection of the same for all heat, power and gas service furnished to such city or to any of the inhabitants thereof by virtue

of a franchise ordinance that may hereafter be authorized by virtue of franchise ordinance to furnish * * * light, power, gas, or any other commodity or service to such city or its inhabitants," and that the city shall have the power to alter, amend, modify, or repeal such ordinances, then clearly the language used in this ordinance is expressive of an intent that the rates fixed shall be maximum rates with the power reserved to the city (or, of course, to the state if the state elects to use the power direct), to reduce the rates to such figures as may be reasonable under the conditions that might arise from time to time.

If the provisions of Section 170, Chapter 122, Laws of 1903, same being Section 1034, General Statutes 1909, which reads as follows:

> "The mayor and council of any such city shall at all times during the existence of any such grant, contract or privilege have the right by ordinance to fix a reasonable schedule of maximum rates to be charged for public and private purposes, including street lighting by any such person, company, or corporation, to the inhabitants of any such city, for gas light, electric light, electric power, or heat, and the rate of fare on any street railway."

are to be given any force and effect, then, also, must the language used in this case be construed as language authorizing the charge of reasonable rates with power reserved in the city to reduce the maximum rates so specified from time to time as occasion might prove proper.

We think that under the contract made, in light of the power reserved, the public is not bound to pay the maximum rates fixed by the franchise. If the contract is to be measured upon the power conferred in Section 170-A, then under the authority of the case of *In re* Pryor, the power conferred can be used only in fixing maximum rates. The company has bound itself not to collect in excess of such rates, and is, of course, bound thereby.

The rights asserted by the plaintiff in error are contract rights.

No contract fixing the rates to be charged the public is in existence, therefore, without violating any contract the state is empowered to regulate the rates to be charged by the plaintiff in error.

Chapter 122 Laws of 1903—Power to Grant Franchise for Natural Gas.

The plaintiff in error assumes in his brief and argues that Sections 21, 51, 169 and 170, Laws of 1903, in each of which reference is made to the granting of gas franchises, the reference is to manufactured or artificial gas.

The term gas when commonly used includes natural gas as well as artificial gas.

The plaintiff in error although dealing exclusively in natural gas is incorporated under the name of the Wyandotte County Gas Company. It never occurred to the company that its name was a misnomer.

In the case of *In re Pryor*, 55 Kansas 724, 41 Pac. 958, in determining the power of a city to regulate rates

to be charged for natural gas, the Supreme Court of Kansas examined a statute providing: "Any gas or water company shall have full power to manufacture and sell and to furnish such quantities of gas and water as may be required," etc., and held that the natural gas franchise was granted thereunder and its rights were measured in accordance with the terms of said act.

But under the provisions of Section 51 of such act the power is granted to fix maximum rates and charges for all "heat, power and gas services," which is clearly broad enough to include every service to be rendered by the grantee under its franchise "to furnish natural gas for lighting, heating, power and manufacturing purposes" (See Transcript of Record 33). And in addition thereto the right is granted the city to prescribe and fix maximum rates for "any other commodity or service"—clearly this language is broad enough to include natural gas.

The very words relied upon are, however, expressive of the contents of the prior statutes—"Nothing herein contained shall be construed," etc. Implying that in the absence of this proviso the prior acts could properly be so construed as authorizing a natural gas franchise.

In the brief filed in this court the plaintiff in error, page 86, asserts the public utilities act of 1911 is void on account of excessive penalties.

No penalties are sought to be collected of plaintiff in error.

The point suggested is not within the issues in this case.

Wherefore, the defendant in error respectfully submits the judgment of the Supreme Court of Kansas should be affirmed.

HENDERSON S. MARTIN,
A. E. HELM,
RICHARD J. HIGGINS,
Solicitors for the Defendant in Error.

WYANDOTTE COUNTY GAS COMPANY *v.* STATE OF KANSAS, ON RELATION OF MARSHALL, ATTORNEY FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 472. Argued December 2, 1913.—Decided January 5, 1914.

The fact that the determination of the question of power of the municipality to make the contract alleged to have been impaired involves consideration and construction of the laws of the State does not relieve this court from the duty of determining for itself the scope and character of such contract.

While this court, in determining whether there is a contract, is not bound by the construction of the state statutes by the state court, it will not lightly disregard such construction but will seek to uphold it

so far as it can consistently with the duty to independently determine the question.

In this case, this court reaches independently the same conclusion as the state court in determining that under the authority conferred by the statutes of Kansas the municipality cannot divest itself by contract of its duty to see that only reasonable rates are enforced under a public utility franchise.

A proviso in a public utility statute, in which manufactured gas, light and water were enumerated, stating that municipalities were not prohibited from granting franchises for supplying natural gas on terms and conditions agreed to by it and the franchisee, construed as bringing natural gas within the statute, and that the terms and conditions on which the franchise could be granted were subject to the same limitations contained in the statute as applicable to franchises for other utilities.

88 Kansas, 165, affirmed.

THE facts, which involve the power of a municipality in Kansas to regulate charges for natural gas, are stated in the opinion.

Mr. J. W. Dana, with whom *Mr. W. F. Douthirt* was on the brief, for plaintiff in error:

The construction of this court is controlling and it will determine for itself whether a contract exists within the meaning of the contract clause of the Constitution. *Louisville Gas Co.* v. *Citizens Light Co.*, 115 U. S. 683, 697; *McCullough* v. *Virginia*, 172 U. S. 102; *Crosslake Club* v. *Louisiana*, 224 U. S. 632; *Vicksburg* v. *Water Co.*, 185 U. S. 65.

Power to regulate rates by municipality may be suspended by contract. *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265; *Detroit* v. *Citizens Railway Co.*, 184 U. S. 368; *Vicksburg* v. *Waterworks Co.*, 206 U. S. 496.

Municipal corporations may be invested by statute with power to bind themselves by irrevocable contract not to regulate rates. *Water Co.* v. *Freeport*, 180 U. S. 587; *Los Angeles* v. *Water Co.*, 177 U. S. 558; *Water Co.* v. *Walla Walla*, 172 U. S. 1; *New Orleans Water Co.* v.

Rivers, 115 U. S. 674; *Louisville* v. *Cumberland Tel. Co.*, 224 U. S. 648; *Vicksburg* v. *Water Co.*, 185 U. S. 65; *Vicksburg* v. *Waterworks Co.*, 202 U. S. 453; *Street Railway Co.* v. *Minneapolis*, 215 U. S. 417.

The power to fix and regulate rates is governmental, inherent in the State, and cannot be exercised by a subordinate subdivision such as a municipality unless conferred by the State. *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265; *Water Co.* v. *Freeport*, 180 U. S. 587; *Stanislaus County* v. *San Joaquin Co.*, 192 U. S. 201.

The power to regulate rates by a municipality may be implied from the statute, and if implied is as authoritative as though expressly granted. *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265; *Street Railway Co.* v. *Minneapolis*, 215 U. S. 417; *Vicksburg* v. *Water Co.*, 206 U. S. 496.

This power is clearly implied in the Kansas statutes, and by § 51 of the act of 1903 municipalities were given power to prescribe and fix reasonable and just maximum rates for public utilities, and under § 170*a* the municipality was given power to agree on terms with companies supplying natural gas. Similar provisions in the other statutes involved in the cases cited *supra* have been construed as conferring power on municipalities to make binding contracts as to rates in future. See also *Water Co.* v. *Omaha*, 147 Fed. Rep. 1; *City Ry. Co.* v. *Citizens Ry. Co.*, 166 U. S. 557.

The decisions of the Kansas courts are a part of the contract in this case and estop the State from denying its validity. *Territory* v. *Rayburn*, 1 Kansas, 552; *Jones* v. *State*, 1 Kansas, 273; *Dudley* v. *Reynolds*, 1 Kansas, 285; *Leavenworth* v. *Rankin*, 2 Kansas, 357; *Leavenworth* v. *Laing*, 6 Kansas, 287; *Atchison Street Ry.* v. *Mo. Pac. Ry.*, 31 Kansas, 661; *Wood* v. *Water Co.*, 33 Kansas, 597; *Wyandotte* v. *Corrigan*, 35 Kansas, 24; *Winfield* v. *Gas Co.*, 37 Kansas, 24, and 51 Kansas, 70; *Water Co.* v. *Burlington*, 43 Kansas, 725; *Manly* v. *Emley*, 46 Kansas, 655; *Water*

Co. v. *Columbus*, 48 Kansas, 99; *Watkins* v. *Glenn*, 55 Kansas, 417; *Mills* v. *Osawatomie*, 59 Kansas, 463; *State* v. *Water Co.*, 61 Kansas, 561. See also § 59, c. 100, Laws of Kansas 1872, under which power to regulate is reserved and the power to contract is not modified. *Baxter Springs* v. *Light Co.*, 64 Kansas, 591; *Bank* v. *Arkansas City*, 76 Fed. Rep. 271, and cases cited.

The contract in this case has been sustained in *Wyandotte Gas Co.* v. *Commissioners*, 83 Kansas, 195.

The binding force of municipal franchise contracts has been so often sustained by the Kansas courts as not to be now open. Cases *supra*, and see also *Potwin Place* v. *Topeka Ry. Co.*, 51 Kansas, 609; *Street Ry. Co.* v. *Nave*, 38 Kansas, 744; *Kansas City* v. *Gas Co.*, 9 Kans. App. 325; *Water Co.* v. *Galena*, 74 Kansas, 644; *Brown* v. *Atchison*, 39 Kansas, 37.

Mr. Richard J. Higgins, with whom *Mr. Henderson S. Martin*, *Mr. A. E. Helm* and *Mr. John Marshall* were on the brief, for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

The Supreme Court of the State of Kansas, with a modification to which it is not necessary to refer, affirmed a decree of the District Court of Wyandotte County, Kansas, enjoining the plaintiff in error, the Wyandotte County Gas Company, from charging domestic consumers in the cities of Kansas City, Kansas and Rosedale, Kansas, for natural gas furnished, any sum in excess of 25 cents per thousand cubic feet. To such decree this writ of error is directed, and the Federal ground relied upon for reversal, is the existence of contract rights in favor of the Gas Company, which it is insisted were impaired by the action of the court below.

The price which the court below sustained was lower than the rate charged by the Gas Company and was in effect a statutory rate since a state law fixed the rate and forbade the charging of a higher rate without the consent of the State Utilities Commission, which consent the Gas Company, under the theory that its contract relieved it from doing so had not sought to obtain.

The court below rested its conclusion upon the grounds, first, that the company had no contract rights fixing rates which were impaired by enforcing the lower rate fixed in the subsequent state law, and second, that if the city had agreed with the company to fix contract rates, the action of the city was void since the city possessed no authority to make a contract limiting its power to fix reasonable rates for the future. As the question of power, which the last proposition involves, lies at the foundation of the case, we come first to consider it, indulging, for the sake of argument in the hypothesis that the city contracted with the company for fixed rates during a stated period, which contract would be impaired if the subsequent legislation here complained of was enforced.

At the outset it is certain that the determination of the question of power involves a consideration and construction of the law of the State from which the city derived its authority. While, indeed, that fact does not relieve us from the duty of determining for ourselves the scope and character of the asserted contract, it is yet elementary doctrine that in the discharge of such duty it is incumbent upon us not to lightly disregard the construction put by the court below upon the statutes of the State, but to seek to uphold such construction as far as it can be done consistently with the obligation to independently determine whether a contract exists which in disregard of the Constitution has been impaired by subsequent legislation.

The alleged contract arises from the passage in 1904 by the city of ordinance 6051 and action taken thereunder.

The question of power is to be determined by a consideration of a comprehensive state law adopted in 1903 regulating cities of the first class, of which Kansas City was one. This law was incorporated in the general statutes of Kansas for 1905, and in referring to it we quote the section numbers as found in the act of 1905, putting in brackets the section numbers of the law of 1903 as originally adopted. Under the heading of "General Provisions" in the fourth paragraph of § 735 [3] cities of the first class were empowered "To make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers."

Under the heading of "Legislative Department, Powers of the Mayor and Council" it was provided in § 784 [51]:

"Rates for Water, Light, etc. Sec. 51. To prescribe and fix maximum rates and charges, and regulate the collection of the same, for all water, electric light, heat, power, gas, telephone service or any other commodity or service furnished to such city or to any of the inhabitants thereof by any person or corporation now authorized by such city by virtue of a franchise ordinance, or that may hereafter be authorized by virtue of a franchise ordinance to furnish water, electric light, heat, power, gas or telephone service, or any other commodity or service, to such city or to its inhabitants. The rates and charges so prescribed shall at all times be reasonable and just; and if any city shall fix unreasonable and unjust rates and charges, the same may, at the instance of any producer or consumer, be reviewed and determined by the district court of the county in which such city is situated."

Under the heading of "Public Utilities," § 902 [167], authority was given for the securing of an adequate supply of water and the granting of franchises to that end, as well as of contracting for laying pipes, etc., etc. The section contained the following provision as to rates:

"Provided further, that . . . the mayor and council of any such city shall at all times during the existence of any such grant, contract or privilege have the right by ordinance to fix a reasonable schedule of maximum rates to be charged for water for public and private purposes by any such person, company or corporation: Provided, however, That said mayor and council shall at no time fix a rate which will prohibit such person, company or corporation from earning at least eight per cent. on its capital invested over and above its operating expenses and expenses for maintenance and taxes. In establishing and fixing such rates, the value of the plant and property of any such person, company or corporation shall be taken into consideration, but the value of such franchise, contract and privilege given and granted by the city to such person, company or corporation shall not be taken into consideration in ascertaining the reasonableness of the rates to be charged to the inhabitants of such city."

Moreover, the section, after directing that a contract should be reduced to writing, contained the following:

"and any attempt to evade, directly or indirectly, the requirements of this act as to such consideration, or the obligations and conditions of such contract, shall render such contract and franchise absolutely null and void and inoperative."

By § 904 [169] the same general power was given to make contracts and grant franchises, etc., concerning heat, light, power and street railway franchises, as was conferred, as above stated, for the purpose of obtaining a water supply; but as to the authority to fix rates by contract, the power was limited by a restriction in substance the same as that which was imposed upon the right to contract for rates for the purposes of a water supply, since by § 905 [170] the right of the city in that respect was expressly reserved to

"at all times during the existence of any such grant,

contract or privilege . . . to fix a reasonable schedule of maximum rates to be charged for public and private purposes, including street lighting by any such person, company, or corporation, to the inhabitants of any such city, for gas light, electric light, electric power, or heat, and the rates of fare on any street railway."

Section 906 [170a], contained regulations as to the period of the contract which might be made and other general regulations, and closed with the provision which is inserted in the margin. [1]

Considering these statutory provisions the court below (88 Kansas, 165) decided that they did not authorize the city to divest itself by contract of its duty to see that nothing but reasonable rates were enforced, however much the statute might have as to other subjects conferred upon the city an authority to contract in the complete sense. Looking comprehensively at the provisions in question, in the light of the duty resting on us to which at the outset we referred, not lightly to disregard the construction which the state court of last resort has given to the statutes of the State, we can see no ground for holding that the court erred in its conclusion. Conceding that there are forms of expression used in the statute which taken isolatedly might be considered as having conferred the power to fix a contract rate, such concession is not decisive, since we must consider the statute as a whole. And

[1] *Nothing in the act shall be construed as prohibiting any city governed and controlled by the provisions of this act from granting, and the mayor and council of any such city are hereby authorized to grant, to any person, company, or corporation, a franchise to construct, maintain and operate a natural-gas plant for the purposes of furnishing to said city and its inhabitants natural gas for lights, fuel, and all other purposes, with authority to lay and maintain all necessary mains and pipes in the streets, avenues, alleys and public grounds of said city, on such terms and conditions as may be agreed to by said mayor and council and such person, company, or corporation: Provided, That such franchise shall not continue for a longer period than twenty years.*

when we do so, we think, to divorce the expressions referred to, from the context would be, not to interpret and apply, but to distort the statute. Especially is this conclusion necessary when the broad scope of the provisos which we have quoted is taken into view, since they in effect forbid the making of contract rates as to both water and gas by commanding that the governmental power to see to it that only reasonable rates are exacted shall be perpetually preserved and exerted. In face of such a plain manifestation of the legislative will, it would be a departure from the obvious intent and purpose of the lawmaker to hold that the statute conferred the power to do that which the text makes it apparent there was a dominant and fixed purpose of the legislature to forbid. This conclusive view also applies to the special provision concerning natural gas. We say this because, as obviously the prior sections of the statute embraced only manufactured gas, the provision as to natural gas was rendered necessary in order to give the same power to deal with that subject as was conferred concerning manufactured gas. In other words, on its face, the purpose of the provision was to bring natural gas within the statute, subject to the regulations and limitations which the statute imposed and it could not therefore have been intended to cause dealings concerning natural gas to be for the purposes of power conferred within the statute and at the same time to exclude the conferred authority from the safeguards and regulations which the statute exacted. The bringing of natural gas within the power therefore caused it to be subject to the limitations which the statute imposed and which as we have seen rendered it impossible to contract away the governmental power to forbid unreasonable and secure reasonable rates.

Affirmed.